Before the Administrative Hearing Commission State of Missouri

0109

STATE COMMITTEE OF PSYCHOLOGISTS Petitioner, vs. STEVEN J. TENENBAUM, PhD, Respondent.	)	No. 03-2146 PS

DECISION

The State Committee of Psychologists ("the Committee") has cause to discipline Steven J. Tenenbaum, a licensed psychologist, under § 337.035.2(5), (6), (10), and (13),[1] because he offered free psychological services to a woman as a pretext to induce her to become his client and then had sexual contact with her after she became his client.

Procedure

On November 3, 2003, the Committee filed a complaint. We held a hearing on September 1, 2004. The last written argument was filed on January 20, 2005. Assistant Attorney General Ronald Q. Smith represented the Committee at the hearing. Assistant Attorney General Daryl Hilton filed the written arguments for the Committee. James B. Deutsch, of Blitz, Bardgett & Deutsch, L.C., represented Tenenbaum.

[1] Statutory references are to the 200 Revised Statutes of Missouri.

Findings of Fact

1. Tenenbaum holds a psychologist license that the Committee issued to him in 1987. Tenenbaum's license was current and active at all relevant times.

2. Tenenbaum practices psychology in St. Louis County. He has developed a specialty practice including treatment of attention deficit hyperactivity disorder. Since 1987, Tenenbaum has been in private practice with Affiliated Psychotherapists, evaluating children and adult outpatients. Tenenbaum founded the Attention Deficit Center in 1992.

3. In the fall of 2003, Tenenbaum, who was 42 years old, began exercising at 24-Hour Fitness ("the gym") in Chesterfield. Tenenbaum scheduled his exercises with a personal trainer for 6 a.m. on Tuesdays and Thursdays. He instructed the gym to call him on his cell phone if his trainer could not be there.

4. The gym employed receptionists at the front desk to greet members and "scan" them in. The management expected the receptionists to be cordial and greet each member by his or her first name. The receptionist on duty at 6 a.m. for the three weeks up to November 19, 2003, was a 42-year-old woman named C.J. After 18 years of marriage, she got divorced in 1998. She had two sons, 10 and 18 years old.

5. C.J. first met Tenenbaum when she greeted him at the front desk about three weeks before November 19.[2] During the next week, Tenenbaum stopped and talked with C.J. a little longer, inquiring when C.J. did not look happy. C.J. explained that she was having problems with her ex-husband.

6. At some point before November 19, Tenenbaum told C.J. that he was a therapist and treated people for anger. He also told her that he specialized in treating children with

[2]Date references are to 2003, unless otherwise noted.

attention deficit hyperactivity disorder and that he conducted a support group for divorced women.

7. The week before November 19, Tenenbaum and C.J. talked about how she could manage her anger against her ex-husband. Tenenbaum told C.J. that he helps patients, including divorced women, learn how to deflect anger. Tenenbaum showed C.J. something like a karate move to demonstrate that she must deflect anger as a karate fighter deflects the force of an opponent.

8. During the time leading up to November 19, C.J. told Tenenbaum how difficult it was bringing someone new into her life with all the problems she has. Tenenbaum tried to help C.J. feel better about herself by telling her to repeat to herself, "I am a goddess," insisting that she repeat it out loud. She did. Tenenbaum told her that men should line up to date her and that she had so much passion.

9. When Tenenbaum went to the gym on the morning of November 19, C.J. told Tenenbaum that she had not called him to tell him his trainer had called in sick, because she looked forward to talking to him. He made her feel good about herself. They discussed her personal problems concerning her relationships with men.

10. C.J. told Tenenbaum that she would go to a therapist, but that her insurance would not cover it. Tenenbaum suggested trading his services for training. C.J. said that this would not work.

11. At some point during their conversation, another gym member, LaDonna Swetnam, went to the receptionist desk. C.J. informed Swetnam that her trainer had not shown up. As C.J. greeted other members, Swetnam and Tenenbaum conversed about medical insurance. Tenenbaum knew that Swetnam worked for a pharmaceutical company. He told her about how his insurance company refused to reimburse him for a prescription medicine he needed.

12. When C.J. rejoined the conversation, she mentioned again that she did not have insurance to go to a therapist. Tenenbaum told C.J. and Swetnam that he had taken on patients sometimes without requiring them to pay. He said that his wife, who managed the business aspect of his practice, got upset at him for doing this. Tenenbaum said that he would see C.J. as his patient and that she would be "my special little project." C.J. said, "great."

13. C.J. understood that Tenenbaum was offering his professional services to her for free because she had no insurance.

14. Tenenbaum left the reception desk and completed his workout without his trainer.

15. As Tenenbaum left the gym, he told C.J. to see him at his office at 6:05 that evening. Tenenbaum gave C.J. his business card and told her that his office was at 777 New Ballis Road and asked if she knew where that was. She told him she knew because her children's pediatrician's office used to be there. Tenenbaum also told her how to get to his office on the third floor. C.J. said okay. C.J. did not know that Tenenbaum did not see scheduled patients after 6 p.m.

16. Tenenbaum thought that C.J. had been flirting with him before November 19. When she told him on November 19 that she would like to get professional help for personal problems but had no insurance, he saw an opportunity to try to have sex with her. He told her he would see her in his office at no cost. He knew that C.J. was asking for his professional help with her emotional distress and that he was using the "mantel" of his profession to seduce her. Tenenbaum knew that asking C.J. to his office was misleading to her. He used his office as the trysting place to impress her and because it was the only place he could take her.

17. C.J. arrived at Tenenbaum's office shortly before six. In a few minutes, Tenenbaum came out with his last client of the day. He told C.J. to come back to his private office. There were other offices around with therapists working in at least some of them.

18. C.J. sat on a sofa while Tenenbaum sat in a chair.

19. Tenenbaum told C.J. that he was doing this "as a friend." Tenenbaum said that C.J. "was not his client" and "not on the books" and that she could not afford his $125-per-hour fee. He did not further explain this. She said, "Okay, because I can't pay you."[3]

20. Tenenbaum initiated things by talking about C.J.'s personal problems and how to deal with her ex-husband and dating.[4]

21. After about 30 minutes, Tenenbaum told C.J. that she had much passion and that he wanted her passion. Tenenbaum rolled his chair over to C.J. He kept telling her to relax and to put her arms down to her sides. He touched her face with both of his hands. He pulled C.J. to him and started hugging her. He asked if that felt good. She said yes. Tenenbaum told C.J. that he was going to help her to move on and get from "point A to B." C.J. did not understand what he meant.

22. Tenenbaum began rubbing C.J.'s shoulders. He moved his hands to her breast. He unbuttoned the top two buttons of her shirt. She told him to stop, and he did.

23. Tenenbaum sat on the sofa next to C.J. Tenenbaum rubbed her shoulders. He told her that sometimes he saw her as a child that he wanted to spank and then he saw her as a woman whom he wanted to undress. He asked if the rubbing felt good. C.J. said yes. Tenenbaum told her to put her arms down and to relax and things would be okay.

24. Tenenbaum put his hands around the front of C.J. over her shoulders and started touching her breast. She told him to stop. He told C.J. that he was trying to help her get from Point A to B. Tenenbaum told her how special she was and how she was like a firefly. He said he did not have that with his partner. He repeated that he wanted C.J.'s passion.

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[3] Tr. at 32, 55; Resp. Ex. 1, at 2.

[4] Tr. at 32-33.

25. Tenenbaum lay back on the sofa and began pulling C.J. to him. C.J. told Tenenbaum to stop. He stopped.

26. Tenenbaum sat up. He took C.J.'s left hand and placed it on his trousers over his penis. He told C.J. to "look what you do to me." C.J. moved her hand away. Tenenbaum told C.J. that men should line up to date her and that she should be very picky about whom she wanted to be with.

27. Tenenbaum knelt in front of C.J. Tenenbaum put her knees on his shoulders. He put his mouth between her legs. Tenenbaum said he wanted to taste her. She put her legs down.

28. Tenenbaum asked C.J. how she liked sex with her boyfriend. She said she liked to be on top. Tenenbaum said that for C.J. to get from Point A to B, she would have to have sex and that Tenenbaum would help her. Tenenbaum said that C.J. would have to have sex, but not with her heart.

29. Tenenbaum started rubbing her breast and took her breast out of her bra. He started kissing her. Tenenbaum asked if her boyfriend was rough or gentle with her and how she liked it. C.J. said he was rough.

30. Tenenbaum started kissing her nipples. C.J. told him to stop. Tenenbaum stopped.

31. Tenenbaum said that he wanted to help C.J. get from Point A to B and that it might take a few times but that he could get her from A to B. Tenenbaum said that C.J. was a goddess and that she should say it. She said she was a goddess.

32. Tenenbaum told C.J. that she should see what she does to him. He exposed his penis to her. He told her to touch it to see how big it is. He told her that she could not keep up with him. She told him that her boyfriend has no complaints. Tenenbaum told her to touch his penis. She did and then pulled her hand away. Tenenbaum put his penis between her legs and told her to see what she could have. He asked if she was wet. She said yes.

33. She told him to stop. He stopped. Tenenbaum put his penis back into his pants.

34. C.J. told him that she had to leave because her boys were waiting for her. Tenenbaum told her that was not true because the boys were older. C.J. said she needed to leave. It was about 7 p.m.

35. Tenenbaum told C.J. that he had an affair with someone in his office. The other woman had been trying to make it work between them, and she was going to leave her husband. Tenenbaum told the other woman that he had too much to lose and she had to leave. The affair lasted a year and a half. C.J. asked if Tenenbaum still saw her. He said no, but she works in the building. Tenenbaum said he told his wife. She forgave him.

36. Tenenbaum told C.J. that he wanted to help her. Tenenbaum said that he would help C.J. because one day he wanted C.J. to come into his office and say, look at this rock on my finger and tell him how happy she was.

37. C.J. said that she had to go. She got up and was unzipping her pants to tuck in her shirt. C.J. asked him what he was looking at. He said he was looking at the heart tattoo she had on her right hip. C.J. said, "Isn't that the cutest thing you ever seen?" Tenenbaum said yes and kissed his fingers. He tried to touch his fingers to the tattoo, but C.J. did not let him. He asked to "taste her." She said no. C.J. said that if she came in naked with a fur coat on, he would just want to have sex with her. Tenenbaum explained that he just wanted to help her work out her problems.[5]

38. C.J. left. She did not visit or call Tenenbaum after that, nor did he call her.

39. The next day, C.J., with the advice and help of a friend, Adam Pickering, went to the Town and Country Police Department. She reported what happened with Tenenbaum to Detective Steven Cintel.

[5]At some point during their encounter, C.J. playfully bit Tenenbaum's finger when he was touching her lips.

40. On November 21, Cintel interviewed Tenenbaum. Tenenbaum's account of his interactions with C.J. at the gym and at his office on November 19 was detailed and remarkably similar to C.J.'s account. Cintel arrested Tenenbaum for sexual misconduct in the first degree. Cintel also continued interviewing people, including interviewing C.J. a second time. He took her written statement on November 21. Eventually, the prosecutor declined to file charges.

41. On November 25, C.J. traveled to Jefferson City and filed a complaint against Tenenbaum with the Committee.

42. On December 4, C.J. began therapy with a licensed clinical social worker who was a sexual trauma specialist.

43. From November 25, 2003, to February 12, 2004, C.J. wrote four letters to the Committee's executive director urging prompt action against Tenenbaum.

Conclusions of Law

Section 621.045.1 gives us jurisdiction to hear the Committee's complaint. The Committee has the burden to prove that Tenenbaum has committed an act for which the law allows discipline. ***Missouri Real Estate Comm'n v. Berger***, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

Ruling on Evidentiary Issues

On November 21, Cintel interviewed Tenenbaum. Cintel summarized the interview in his police report. The Committee marked the police report as Petitioner's Exhibit A. The Committee offered only those portions of Cintel's interview with Tenenbaum ("the interview report") that consist of Tenenbaum's admissions against interest. (Tr. at 211.) The Committee did not specify which of Tenenbaum's statements it wanted us to consider as admissions against interest, leaving to us the task of reading the entire interview report and deciding which

statements the Committee might be thinking of using and whether they qualify as admissions against interest.

Tenenbaum objected on two bases. First, Tenenbaum contends that the interview did not contain his verbatim statements, only Cintel's summary of what Tenenbaum said. (Tr. at 213.) Second, Tenenbaum contends that he was not a party to the proceeding for which the interview report was made. The interview report was made in the investigation of a criminal case, and Tenenbaum was never a party to a criminal charge. Therefore, Tenenbaum contends that his statements cannot be the admissions of a party. We admitted the report subject to Tenenbaum's objections. (Tr. at 214, 233.)

Tenenbaum also objected to Cintel testifying from his own memory about what Tenenbaum said to him during the November 21 interview as being hearsay. We took the objection with the case. (Tr. at 220, 233.)

As for the objection to the interview report, § 536.070(10) provides for the admission of records, such as police reports, "if it **shall appear** that it was made in the regular course of any business, and that it was the regular course of such business to make such . . . record at the time of such . . . transaction . . . or within a reasonable time thereafter." (Emphasis added.) "The administrative law judge may determine from the totality of the circumstances whether the document meets the criteria; the document's custodian or preparer need not be present to sponsor the document." ***State ex rel. Sure-Way Transp. v. Division of Transp., Dep't. of Economic Development***, 836 S.W.2d 23, 26 (Mo. App., W.D. 1992).

Cintel was a detective with the Town and Country Police Department. He authored the interview report on November 21, the day of his interview with Tenenbaum. He testified that he did the interview report in the course of his investigation of C.J.'s report of a crime that

Tenenbaum allegedly committed against her. We conclude that the report was made in the regular course of the business of the police department, and it was the regular course of the police department to make such a report at or shortly after the interview. Therefore, Petitioner's Exhibit A is admissible under § 536.070(10).

However, not everything in a record that's admissible under § 536.070(10) may be considered as evidence of the truth of what is asserted. As the court held in ***Edgell v. Leighty***, 825 S.W.2d 325, 329 (Mo. App., S.D. 1992):

> The general rule applicable to the admission of accident reports has been summarized.
>
> "It is generally recognized that the business records exception does not make admissible anything contained in the record or report which would not be admissible if testified to by the maker of the record or report. Consequently, . . . the content of a police report which was not the result of the reporting officer's own observations, but was the product of statements made to the officer by third persons, could not be admitted into evidence under the business records exception to the hearsay rule, unless the third party making the statement was under a business duty to do so." Annot., Police Reports as Business Records, 77 A.L.R.3d 115, 133 (1997).

The only statements from others that Cintel included in the interview report were those that Tenenbaum make directly to him. These are admissible under the rule in ***Edgell v. Leighty.***

Further, we have set out in our discussion of the merits of the complaint certain of Tenenbaum's statements to Cintel that supported the Committee's complaint and that were, at least to some degree, contrary to Tenenbaum's position at the hearing. These statements are in the interview report and in Cintel's testimony from his own memory. Independent from their admissibility in the interview report under § 536.070(10), these statements are admissible as Tenenbaum's admissions against interest.

The court set forth the criteria for determining admissions against interest in ***Around the World Importing v. Mercantile Trust Co.***, 795 S.W.2d 85, 89 (Mo. App., E.D. 1990):

> In order for a statement of a party to be competent as an admission against interest, it is not necessary that it be a direct admission of the ultimate facts in issue, but it may be competent if it bears on the issue incidentally or circumstantially.
>
> There are three requirements necessary to admit an admission by a party-opponent: 1) a conscious or voluntary acknowledgment by a party-opponent of the existence of certain facts; 2) the matter acknowledged must be relevant to the cause of the party offering the admission; and, 3) the matter acknowledged must be unfavorable to, or inconsistent with, the position now taken by the party-opponent.

(Citations omitted.)

Tenenbaum's statements were in direct response to the questions that Cintel asked him about the allegations that C.J. made regarding what happened between her and Tenenbaum on November 19 at the gym and at Tenenbaum's office. Cintel apprised Tenenbaum of C.J.'s allegations and asked Tenenbaum for his side of the story. Tenenbaum's statements were a conscious acknowledgement of the existence of facts. Those facts concerned the same conduct that the Committee has alleged in its complaint as constituting cause for discipline. The statements that the Committee seeks to offer are those that are "unfavorable to, or inconsistent with, the position now taken by the party-opponent." Specifically, Tenenbaum's statements tend to acknowledge that he offered to provide free psychological services to C.J. upon her request for those services. We conclude that those statements in the interview report and those that Cintel testified to from his own memory are admissible as admissions against interest.

At the hearing, Tenenbaum objected also on the ground that the statements were not taken during these proceedings, but rather during a criminal investigation in which Tenenbaum was never made a party. Tenenbaum cites no authority for the proposition that statements can be

considered admissions against a party's interest only if those statements occurred in the course of the particular case in which they are being offered. We found no such authority either. We overrule the objection.

Merits of the Complaint

The Committee's core contention is that Tenenbaum's conduct violated the "Ethical Rules of Conduct" (the Ethical Rules) as set forth in the Committee's Regulation 4 CSR 235-5.030:

> (1) General Principles.
>
> (A) Purpose. The ethical rules of conduct constitute the standards against which the required professional conduct of a psychologist is measured.
>
> (B) Scope. The psychologist shall be governed by these ethical rules of conduct whenever providing psychological services in any context. These ethical rules of conduct shall apply to the conduct of all licensees and applicants, including the applicant's conduct during the period of education, training and employment which is required for licensure. The term psychologist, as used within these ethical rules of conduct, shall be interpreted accordingly whenever psychological services are being provided in any context.
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> * * *
>
> (D) Violations. A violation of these ethical rules of conduct constitutes unprofessional conduct and is sufficient reason for disciplinary action or denial of either original licensure, reinstatement or renewal of licensure.
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> * * *
>
> (2) Definitions.
>
> (A) Client. Client, as used in this code, means a patient or any other receiver of psychological services or that person's legal guardian.
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> * * *

(4) Impaired Objectivity and Dual Relationships.

* * *

(C) Prohibited Dual Relationship.

1. The psychologist, in interacting with any current client or with a person to whom the psychologist at any time within the previous sixty (60) months has rendered counseling, psychotherapeutic or other professional psychological services for the treatment or amelioration of emotional distress or behavioral inadequacy, shall not—

B. Engage in kissing with the mouth, lips or tongue of the psychologist with the client or the client with the psychologist;

C. Touching or caressing by either the psychologist or client of the other person's breasts, genitals or buttocks;

D. Engage in any deliberate or repeated comments, gestures or physical contact of a sexual nature that exploits the professional relationship with the client[.]

C.J. expressed a need for psychological services because of her difficulty in handling certain family and romantic relationship problems that she had described to Tenenbaum. Tenenbaum offered to render free psychological services to C.J., and she accepted. Tenenbaum had her come to his office where he normally counsels patients. He took 30 minutes of their meeting discussing her personal problems before he began touching her.

Section 337.015 defines the practice of psychology:

3. The **"practice of psychology"** within the meaning of this chapter is defined as the observation, description, evaluation, interpretation, treatment, and modification of human behavior by the application of psychological principles, methods, and procedures, for the purpose of preventing, treating, or eliminating symptomatic, maladaptive, or undesired behavior and of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, and mental health. . . . Psychological services may be rendered to individuals, families, groups, and the public. The practice of psychology shall be

> construed within the meaning of this definition without regard to whether payment is received for services rendered.

The problems that C.J. described to Tenenbaum at the gym and the type of services that Tenenbaum offered fall within the legal description of the practice of psychology. The fact that Tenenbaum offered to do this for free as a "friend" does not change the fact that he offered to help C.J. with her personal problems by applying the methods and principles of his profession in a professional context. The sexual conduct that the Committee contends is unethical came after Tenenbaum established this professional relationship with C.J. Therefore, the Ethical Rules govern. Tenenbaum clearly violated the Ethical Rules' prohibition of sexual contact and language with a patient.

Tenenbaum does not disagree in any significant way with what C.J. described happened in his office relating to his touching her. He argues that C.J. had been flirting with him prior to and on November 19 by telling him her personal problems. Tenenbaum contends that a woman of C.J.'s age and maturity would know that his invitation to come up after hours for free psychological services was just his way of inviting her up for a date. He argues that her participation and acquiescence for a time in the advances that he made in his office also shows that she went there for sexual adventure.

The facts do not support Tenenbaum's characterization of events. There is no evidence, not even in Tenenbaum's testimony, of C.J. flirting with him before her office visit. It is not uncommon for people to bring up family or dating problems in their casual conversations. People are especially likely to open up to someone who is a psychologist. (Tr. at 255-56.) As Tenenbaum's expert testified, "[t]he kind of chitchat that they describe goes on all the time in a psychologist's world." (Tr. at 255.) By itself, such conversation is neither flirting nor a request for services.

However, by the end of their conversation on November 19, Tenenbaum understood that C.J. was expressing a need for psychological services. This is why Tenenbaum offered his services for free. Both C.J. and Swetnam testified to this. To the extent that Tenenbaum's testimony is contrary, we believe C.J. and Swetnam. Even more to the point, Tenenbaum admitted this to Cintel the day after the events took place. As Cintel testified, "[h]e [Tenenbaum] told me, she [C.J.] said, I need professional help. And he said, I can help you. Be at my office at 6:05." (Tr. at 220-21.) Further, Tenenbaum told Cintel: "He told me that in this conversation that he had with her that I just related to you that she explained she didn't have any insurance, didn't have any money to pay for it, and he said that he could help her and that he would do it at no cost." (Tr. at 221.)

After his workout, Tenenbaum confirmed his earlier offer by setting an appointment time, giving C.J. his business card, and inviting her to his office where he normally renders psychological services. Of course, he did not bother telling C.J. that 6:05 p.m. was five minutes after his usual appointment times.

When C.J. appeared at his office, he continued to behave as if he was going to render professional services. First, he addressed payment. Tenenbaum told C.J. that he was doing this "as a friend." Tenenbaum told C.J. that she "was not a client" and was "not on the books" and that she could not afford his $125 per hour fee. C.J. was being reasonable when she took this to be an explanation of how this service was to be free. She was "not a client" and "off the books," meaning no billings to an insurance company and no fee charged to C.J., because she was a friend. There was no reason for C.J. to conclude that what Tenenbaum was really telling her was that this was a date, not a counseling session. Second, Tenenbaum began a discussion of C.J.'s

personal problems that lasted for about thirty minutes. (Tr. at 32-34.) Although Tenenbaum now denies this (Tr. at 319), he admitted it to Cintel. Cintel testified at the hearing:

> Q Did Dr. Tenenbaum then tell you what occurred when CJ entered his private office?
>
> A Yes.
>
> Q And what did he indicate was the first thing that occurred when they entered?
>
> A They discussed her personal problems which they had been discussing at their meetings at the health club.

(Tr. at 222.)

Tenenbaum admitted to Cintel that this was all a ploy to convince C.J. to have sex with him. He used his office rather than a motel as "a way to impress her." (Tr. at 223.)

Even though Tenenbaum saw C.J.'s friendliness up to November 19 as "flirting" or "coming on to him," he never told Cintel that he saw C.J.'s request for help on November as her way of asking for a date. Tenenbaum recognized that C.J. was asking for help. As Cintel summarized Tenenbaum's statements in the report:

> [C.J.] has always been talkative, pleasant and up beat with him. He said that he feels she has been flirting with him. When he came in on Tuesday, she told him that his trainer was sick but she didn't call him to cancel his appointment because she looked forward to seeing him and wanted to see him today. She then continued to talk about the problem with her boyfriend and **said that she would like to get professional help but had no insurance**. He then told her that he would see her in his office at no cost. He told her he was doing this as a friend and not professionally. He said he made it perfectly clear to her that **he would try to help her** as a friend and not as a patient. She agreed and he set the appointment . . . .
>
> As he escorted his last patient for the day to the waiting room, he found [C.J.] He told her to come in and they both went to his office. They talked about her emotional problems for a short period of time. Then they made out a little with some heavy petting and she decided to leave and left.

* * *

> **I asked** if when [C.J.] told him his trainer was cancelled and she didn't call him so that she could see him, **if he saw this as an opportunity to further engage [C.J.] in a personal relationship even though she was asking for emotional guidance.** I asked if he saw this as an opportunity to maybe have sex with her. **He agreed that this was the case. He said that even though [C.J.] was asking for help with emotional distress** he saw her words as comforting. He said that he needs to have people tell him that they're interested in him; to like him. It makes him feel good when people are attentive to him. **I asked him if he thought this was the right thing to do with a person who has sought him out on a professional level and he acknowledge [sic] it was wrong of him. He said "When you wear the mantel you have to live to a higher standard. I surely didn't mean to hurt her but I see that I have."**
>
> I asked him if he thought it was OK to bring [C.J.] to his office to seduce her instead of taking her to a hotel or his house or to her house. **I asked if in doing so [C.J.] would interpret this to mean she was going to get his help as a clinician rather than for a personal sexual encounter. He said this too was misleading to her but it was the only place to take her and he used it to impress her.**

(Pet'r Ex. A, at 18-20.) (Emphasis added.)

Through the use of the "mantle" of his licensed status, Tenenbaum obtained C.J.'s presence at his office. The problems that C.J. posed and the services that Tenenbaum offered fall within the description of practicing psychology set forth in § 337.015.3. Therefore, Tenenbaum's conduct during C.J.'s office visit is subject to all the legal principles that pertain to the duties and functions of a licensed psychologist practicing psychology, including those contained in the Committee's Ethical Rules.

Rather than addressing the description of the practice of psychology in § 337.015.3, Tenenbaum attempts to analyze whether he had a professional duty to C.J. in terms of contract and tort law developed in malpractice cases: whether or not there is offer and acceptance so that

a meeting of the minds occurs.[6] There was no meeting of the minds, Tenenbaum contends, because his offer of psychological services was a sham. Accordingly, he contends that he owed C.J. no professional duties and was not bound by the Ethical Rules.

Laws providing for the disciplining of licensed professionals are not developed to resolve business or tort disputes. They are passed to give licensing authorities the means to protect the public. In ***Bhuket v. Missouri Bd. of Regis'n for the Healing Arts***, 787 S.W.2d 882, 885 (Mo. App., W.D. 1990), the Court of Appeals explained:

> Statutes authorizing the Missouri State Board of Registration for the Healing Arts to regulate and discipline physicians are remedial statutes enacted in the interest of the public health and welfare and must be construed with a view to suppression of wrongs and mischiefs undertaken to be remedied.

Being enacted for the protection of life and property, licensing laws are remedial laws, subject to liberal construction. ***State ex rel. Webster v. Myers***, 779 S.W.2d 286, 290 (Mo. App., W.D. 1989).

Offering services to the public is one of the functions of any licensed profession, including the profession of a licensed psychologist in private practice, as was Tenenbaum. A person agrees to become a client of a psychologist, in large part, because of the trust that the psychologist's licensed position engenders in that person. This is why the law protects the relationship formed by means of a licensee's sham offer of services just as it protects the relationship formed pursuant to a legitimate offer.

Tenenbaum had explained to C.J. before November 19 how he counseled women like her to deflect their anger. While this was not an offer to give her services, it shows how C.J. came to believe that he might help her when he did offer his services on November 19. We conclude that

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[6]Tenenbaum cites such cases as ***Corbett v. McKinney***, 980 S.W.2d 166, 169-50 (Mo. App., E.D. 1998), in which the court set forth principles to decide whether a doctor-patient relationship existed between the patient of an emergency room doctor and the specialist whom the emergency room doctor consulted over the telephone.

under the circumstances C.J. was reasonable in believing that Tenenbaum was making a legitimate offer to help her professionally. Tenenbaum cannot have it both ways. He cannot use his licensed status to lure the unsuspecting to his office for sex and then avoid discipline by claiming that his sham offer prevented the formation of a relationship that the law protects. When the licensee makes an offer of services to someone who accepts it reasonably believing it to be legitimate, the licensing laws apply to the licensee's conduct.

The Committee cites § 337.035.2(5), which authorizes discipline for:

> [i]ncompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter[.]

The court in ***Johnson v. Missouri Bd. of Nursing Adm'rs***, 130 S.W.3d 619, 642 (Mo. App., W.D. 2004), held:

> Although the word "incompetency" is not defined in § 344.050.2(5), it has been defined in other license discipline contexts as a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability. *See Forbes v. Mo. Real Estate Comm'n*, 798 S.W.2d 227, 230 (Mo. App. W.D. 1990).

Implicit in the Ethical Rules' prohibition of a sexual relationship with clients is the profession's determination that there is no therapeutic value in the conduct by which a sexual relationship is established and maintained and that such conduct creates an unacceptable risk of harm to the client. Tenenbaum had been practicing psychology since 1987. As a trained and experienced therapist, he knew why such conduct was wrong. This is why he emphasized to Cintel that he was trying to establish a social, not a professional, relationship:

> He [Tenenbaum] told her he was doing this as a friend and not professionally. He said he made it perfectly clear to her that he would try to help her as a friend and not as a patient.

(Pet'r Ex. A. at 18.)

The evidence shows that Tenenbaum knew the risk of harm that he placed upon C.J. by attempting to enter into a sexual relationship with her and that he did not care that he exposed her to risk. Tenenbaum showed a lack of disposition to use his professional ability to avoid exposing his client to these risks. We conclude that he was incompetent.

Misconduct is the willful doing of a wrongful act. ***Grace v. Missouri Gaming Comm'n***, 51 S.W.3d 891, 900-01 (Mo. App., W.D. 2001). Gross negligence is a deviation from the standard of care so egregious as to demonstrate a conscious indifference to a professional duty. ***Duncan v. Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs***, 744 S.W.2d 524, 533 (Mo. App., E.D. 1988). We may infer the requisite mental state from the conduct of the licensee "in light of all surrounding circumstances." *Id.* The mental states for misconduct and gross negligence – intent and indifference, respectively – are mutually exclusive.

We conclude that Tenenbaum knew it was wrong for him to induce C.J. to come to his office with a false offer of professional services in the hopes of entering into a relationship with her that violated the Ethical Rules. His conduct was willful. Accordingly, Tenenbaum was guilty of misconduct, but not gross negligence.

Fraud is an intentional perversion of truth to induce another person to act in reliance upon it. ***Hernandez v. State Bd. of Regis'n for Healing Arts***, 936 S.W.2d 894, 899 n.2 (Mo. App., W.D. 1997). It requires the intent that others rely on the misrepresentation. ***Sofka v. Thal***, 662 S.W.2d 502, 506 (Mo. banc 1983); *see also* ***Missouri Dental Bd. v. Bailey***, 731 S.W.2d 272 (Mo. App., 1987). "Concealment of a material fact of a transaction, which a party has the duty to disclose, constitutes fraud as actual as by affirmative misrepresentation." ***Daffin v. Daffin***, 567 S.W.2d 672, 677 (Mo. App., K.C.D. 1978). That duty arises when the concealer is a

fiduciary or has superior knowledge. ***Nigro v. Research College of Nursing***, 876 S.W.2d 681, 686 (Mo. App., W.D. 1994). We may infer fraudulent intent from the circumstances of the case. ***Essex v. Getty Oil Co.***, 661 S.W.2d 544, 551 (Mo. App., W.D. 1983).

Misrepresentation is a falsehood or untruth made with the intent of deceit rather than inadvertent mistake. ***Hernandez***, 936 S.W.2d at 899 n.3. To "deceive" is "to cause to believe the false." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 584 (unabr. 1986). Dishonesty is a lack of integrity, a disposition to defraud or deceive. *Id.* at 650. Dishonesty includes actions that reflect adversely on trustworthiness. *See* ***In re Duncan***, 844 S.W.2d 443, 444 (Mo. banc 1992).

Tenenbaum admits that he used fraud, misrepresentation, and dishonesty in regard to C.J. His defense, as explained above, is that his lies prevented the formation of a psychologist-patient relationship and therefore the misconduct, fraud and so on were not "in the performance of the functions or duties of any profession licensed or regulated by this chapter."

As explained before, we reject this interpretation of the law. One of the functions of a licensed psychologist is to offer psychological services to the public. The licensing laws apply when a licensed psychologist makes an offer to provide services in circumstances that would lead a reasonable person to believe the offer was legitimate. Those were the circumstances in this case. Tenenbaum continued his charade of playing psychologist when he received C.J. into his office and discussed her personal problems for thirty minutes. He did that to further impress upon her that his words and actions were of a professional nature when he knew he was trying to seduce her. Because of all the professional trappings that Tenenbaum used, C.J. did not realize that his comments about not being a client and being off the books were signals that he wanted to use the session for a tryst. Instead, she interpreted them in a professional context, thinking that

Tenenbaum was telling her she was not on the books as an official client because he was neither billing an insurance company nor charging her a fee.

In his offer to provide services to C.J. and in the way he began conducting his session with her, Tenenbaum used fraud, misrepresentation, and dishonesty in the performance of his functions and duties as a psychologist.

The Committee has cause to discipline Tenenbaum under § 337.035.2(5) for incompetency, misconduct, fraud, misrepresentation, and dishonesty.

The Committee also cites subdivisions (6) and (10), which allow discipline for:

> (6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter;
>
> * * *
>
> (15) Being guilty of unethical conduct as defined in "Ethical Rules of Conduct" as adopted by the committee and filed with the secretary of state.

The regulation that the Committee contends is violated is 4 CSR 235-5.030 and specifically the Ethical Rules. Without needless repetition of the facts, we conclude that Tenenbaum formed a dual relationship with C.J., offering her professional services and then engaging in the sexual conduct that 4 CSR 235-5.030(4)(C)1. B, C, and D prohibit. The Committee has cause to discipline Tenenbaum under § 337.035.2(6) and (15).

Finally, the Committee seeks cause to discipline under § 337.035.2(13) for "[v]iolation of any professional trust or confidence[.]" Professional trust is the reliance on the special knowledge and skills that professional licensure evidences. ***Trieseler v. Helmbacher***, 168 S.W.2d 1030, 1036 (Mo. 1943). Tenenbaum had extensive education, training, and experience in the practice of psychology. Tenenbaum also had the State's blessing as shown by his licensed

status. Such factors create even in well-educated and sophisticated persons a trusting acceptance of what the psychologist recommends. It is evident that C.J. did not have extensive education. She testified that she had never been to psychological counseling or therapy. Tenenbaum had told her about his counseling of divorced women and even had demonstrated for her the "karate" technique that he teaches to women to help them manage anger. C.J. relied upon Tenenbaum's professional abilities and integrity when she accepted his invitation to his office and engaged in a discussion of her personal problems there. She thought he would use his skills to help her. Instead, he engaged her in sexual activity. It does not matter whether she consented or acquiesced for a time after Tenenbaum began touching her. When she went to his office, she relied on his professional judgment and integrity to conduct the session as a legitimate practice of psychology. Tenenbaum violated that trust.

"Professional trust" also includes the trust that Tenenbaum's profession, as embodied in the Committee, places in him when it licenses him to practice. The Committee codified the profession's Ethical Rules in its own regulations to make clear to licensees that the Committee places its trust in them to behave according to these rules.

The Committee has cause to discipline Tenenbaum under § 337.035.2(13).

Summary

The Committee has cause to discipline Tenenbaum under § 337.035.2(5), (6), (10), and (13).

SO ORDERED on February 28, 2005.

JOHN J. KOPP
Commissioner

BEFORE THE
MISSOURI STATE COMMITTEE OF PSYCHOLOGISTS
STATE OF MISSOURI

STATE COMMITTEE OF PSYCHOLOGISTS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 03-2146 PS
	)	
STEPHEN J. TENENBAUM, PhD,	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCIPLINARY ORDER

Findings of Fact and Conclusions of Law

1. On February 28, 2005, the Administrative Hearing Commission of the State of Missouri issued a Decision in *State Committee of Psychologists v. Steven J. Tenenbaum, PhD,* Case No. 03-2146 PS. The Administrative Hearing Commission found that the State Committee of Psychologists ("State Committee") has cause to discipline Respondent Steven J. Tenenbaum, PhD ("Tenenbaum") under § 337.035.2(5), (6), (10), and (13), RSMo, because Tenenbaum offered free psychological services to a woman ("C.J.") as a pretext to induce her to become his client and then had sexual contact with her after she became his client. The Administrative Hearing Commission determined that Tenenbaum is guilty of misconduct and that he used fraud, misrepresentation and dishonesty in the performance of his functions and duties as a psychologist. The Administrative Hearing Commission also determined that Tenenbaum formed a dual relationship with C.J. and violated a professional trust.

2. Pursuant to notice and § 621.110, RSMo, the State Committee held a disciplinary hearing on September 9, 2005, at 1:30 p.m. at the Embassy Suites, St. Charles, Two Convention Center Plaza, St. Charles, Missouri, for the purpose of determining the appropriate disciplinary action against Tenenbaum's license.

3. The State Committee received and incorporated into its record the Administrative Hearing Commission's record of proceedings. The Administrative Hearing Commission's Decision issued on February 28, 2005, in *State Committee of Psychologists v. Steven J. Tenenbaum, PhD,* Case No. 03-2146 PS is incorporated by reference as if fully set forth in this document.

4. Tenenbaum was represented at the disciplinary hearing by counsel, James B. Deutsch. Tenenbaum was present and testified.

5. The State Committee was represented by Assistant Attorney General Rikki Wright.

6. The following members of the State Committee were present for the disciplinary hearing and participated in the State Committee's deliberation and decision:

Glenn E. Good, PhD, Chair;
E. Thomas Copeland, PhD;
Christopher Maglio, PhD;
Rochelle Harris, PhD;
George "Brick" Johnstone, PhD;
Vetta Sanders Thompson, PhD; and
Willa McCullough, M.Ed.

7. Tenenbaum holds a Missouri license to practice as a psychologist, License No. PY0109, which is current and active.

8. The State Committee considered Tenenbaum's testimony at the disciplinary hearing and gave due weight to the evidence presented.

9. Tenenbaum failed to demonstrate by credible evidence that he is aware of the impact of his conduct on the victim, C.J. Tenenbaum was specifically asked about that impact. He showed no empathy for the victim. Tenenbaum's statements of remorse during his testimony tended to focus on the impact his conduct has had on himself and his family. When Tenenbaum testified about the victim, he contended that his involvement with her was the result of the victim misconstruing his intentions, rather than acknowledging that he engaged in a manipulative act to offer free psychological services to the victim in his office as a pretext to inducing her to become his client and to engage her in sexual activity. Tenenbaum failed to demonstrate that he understands the vulnerability of persons, such as C.J., who present for psychological treatment.

10. As evidence of mitigation, Tenenbaum asserted that his conduct involving C.J. on November 19, 2003, was tied to an underlying condition of Attention-Deficit/Hyperactivity Disorder ("ADHD"). Tenenbaum has been licensed since 1986 and, according to Tenenbaum, he was not diagnosed with ADHD until twelve years later in 1998. Tenenbaum advised the State Committee that he has "seventeen years of behavior that doesn't look anything like this[.]" Tenenbaum offered no credible evidence that his condition on November 19, 2003 changed so as to result in a change in his behavior. Tenenbaum failed to establish that ADHD mitigates his conduct on November 19, 2003.

11. As further evidence of mitigation, Tenenbaum asserted that his invitation to C.J. to meet him in his office occurred in the morning when his medication for ADHD was "marginal" and his meeting with C.J. occurred in the evening when he was "fading out to unmedicated." Tenenbaum's testimony regarding the medication he was taking is inconsistent and does not mitigate his conduct.

12. Tenenbaum stated that he currently takes Strattera, a medication to treat ADHD, that "is effective 24/7" and provides "no windows during which the medication is fading and pulsivity [sic] might break through[.]" According to Tenenbaum, Strattera was released in January 2003, and he "was one of the first people to get samples of it. I had been waiting for it eagerly. I had been following it in the research because I was keenly aware of the gap." Tenenbaum's conduct involving C.J. occurred in November 2003, which was eleven months, according to Tenenbaum, after Strattera was released. If Tenenbaum was taking Strattera when he invited C.J. to his office on November 19, 2003, then his testimony that the effect of the medication he was taking for ADHD was "marginal" and that he was "fading out to unmedicated" when C.J. arrived that evening conflicts with his testimony that Strattera, provides "24/7" effectiveness with "no windows during which the medication is fading[.]"

13. Despite his assertion that he was one of the first to obtain samples of Strattera after its release in January 2003, Tenenbaum testified that in November 2003, he was taking Adderall XR, a different medication for ADHD, which was effective for only approximately eight hours. Even if the State Committee accepted Tenenbaum's assertion that he was taking

medication on November 19, 2003, that provided less than continuous effectiveness, the State Committee finds no support for Tenenbaum's assertion that his conduct on that date was tied to ADHD. Tenenbaum testified that at about 7:15 to 7:30 a.m., he invited C.J. to his office and that she arrived at his office that evening. Tenenbaum acknowledged that during the hours between the invitation and the meeting on November 19, 2003, he was medicated for ADHD and he thought about his invitation to C.J. Regardless of whether Tenenbaum was medicated with Adderall XR or Strattera that day, he took no steps to alter his course of action. The hours between the invitation and the meeting provided Tenenbaum an opportunity to consider the propriety of his invitation and of meeting C.J. in his office. Still, he chose to make no effort to cancel the meeting or to dissuade C.J. from coming to his office. Tenenbaum's choice was unrelated to ADHD or the particular medication he was taking for that condition.

14. Tenenbaum testified that since November 19, 2003, he has taken steps to avoid repeating the conduct because he is participating in therapy, has a network of individuals to provide feedback regarding his conduct, and is taking Strattera, which provides longer-lasting therapeutic effects.

15. There is no evidence that when Tenenbaum's therapy concludes his stressors will disappear. Likewise, there is no evidence regarding the sufficiency of the feedback Tenenbaum is receiving from others or whether such feedback is based on any information other than the information that Tenenbaum voluntarily provides to the individuals. Tenenbaum's assertion that a change to Strattera now controls his ADHD for longer periods

of time is not compelling. First, as noted, there is conflicting testimony as to whether Tenenbaum was taking Strattera or another medication for ADHD at the time of the incident involving C.J. Second, regardless of the medication he was taking for ADHD, Tenenbaum admitted he was medicated for that condition during the hours that separated his invitation to C.J. and her arrival at his office, thought about the situation, and took no steps to avoid engaging in conduct that he described as "a betrayal of the most sacred trust" between psychologist and client. As such, the evidence fails to persuade the State Committee that the medication Tenenbaum takes to treat ADHD will prevent him from repeating that type of conduct.

16. Tenenbaum submitted letters from individuals praising his skills as a psychologist and requesting that the State Committee exercise leniency in its decision regarding Tenenbaum's discipline. Those letters were admitted into evidence and have been given due weight. Some of the letters state the letter was written in response to Tenenbaum's request. Additionally, the fact that some colleagues and clients find Tenenbaum to be a skilled psychologist does not lessen the impact of Tenenbaum's conduct on November 19, 2003. Those letters are not an acceptable substitute for Tenenbaum accepting responsibility for his conduct, showing empathy for his victim, and showing remorse for the impact his conduct has had on the victim. By offering free psychological services to C.J. as a pretext to induce her to become his client and then having sexual contact with her after she became his client, Tenenbaum willingly ignored the profession's ethical rules. Additionally, the State Committee notes that Tenenbaum had numerous opportunities to alter his conduct even after

C.J. entered his office, but he failed to do so. The Administrative Hearing Commission noted at least four instances where the victim asked Tenenbaum to stop a particular sexual contact and Tenenbaum stopped, but then proceeded to engage in another sexual contact.

17. The harm resulting from Tenenbaum's violation of the trust placed in him by C.J. and the psychology profession will surely not be erased by the discipline imposed in this case. As Tenenbaum's counsel noted, it is not the State Committee's function to punish Tenenbaum; rather, it is the State Committee's obligation to discipline in a manner that will protect the public. Tenenbaum has not accepted responsibility for his conduct. His assertion that he understands he is responsible rings hollow in light of his assertions that the incident was tied to ADHD and resulted from C.J. misconstruing his intentions. Tenenbaum violated the profession's ethical rule prohibiting dual relationships, has shown no remorse for the victim of his willful conduct, blames the incident on the victim, and blames his conduct on a condition that he admits was sufficiently controlled by medication that provided him ample time for reflection and reconsideration. Those factors are considered in determining the discipline necessary to protect the public from Tenenbaum's use of the mantle of his licensed status.

Disciplinary Order

Therefore, having fully considered all the evidence before the State Committee, and giving full weight to the Administrative Hearing Commission's Decision, it is the ORDER of the State Committee that Tenenbaum's Missouri license to practice as a psychologist is

hereby REVOKED. Tenenbaum shall immediately return to the State Committee all indicia of licensure to practice as a psychologist in Missouri.

The State Committee will maintain this Order as an open and public record of the State Committee as provided in Chapters 337, 610, and 620, RSMo.

SO ORDERED and effective this 18th day of October 2005.

Pamela Groose

Pamela Groose
Executive Director
Missouri State Committee of Psychologists

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

STEVEN J. TENENBAUM, Ph.D.,	)	
	)	
Petitioner,	)	
	)	Case No. _____
vs.	)	
	)	
MISSOURI STATE COMMITTEE OF PSYCHOLOGISTS,	)	
	)	
	)	
Respondent.	)	

STAY ORDER

COMES NOW this Court and upon review of Petitioner's Application for Stay Order and the Petition for Judicial Review filed in this matter, hereby enters its Order staying application of the Missouri State Committee of Psychologist's Disciplinary Order issued on October 18, 2005. This stay shall remain in place and in effect until this Court issues a final decision in the above-captioned matter and the Committee shall take no action to enforce its Order of October 18, 2005, nor shall Petitioner's continuing practice be a matter for discipline solely under the basis of the Order of October 18, 2005, as long as this Stay Order remains in place.

This Court specifically finds that due to the single event being the sole complaint by the Committee and the lack of any indication of a ongoing or future problem with the Petitioner's practice, that there is no need for any bond to be posted with respect to this stay.

SO ORDERED this 20th day of October, 2005.

Judge

(KRW8226.WPD;1)

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

STEVEN J. TENENBAUM, Ph.D.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 05AC-CC01005
	)	
MISSOURI STATE COMMITTEE OF PSYCHOLOGISTS,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

This Court AFFIRMS the Administrative Hearing Commission's ("AHC") Decision finding cause to discipline Tenenbaum under § 337.035.2(5), (6), (10), and (13) and the subsequent State Committee of Psychologists' ("SCOP") Findings of Fact, Conclusions of Law and Disciplinary Order ("SCOP Order or Decision") revoking Tenenbaum's license to practice as a psychologist.

FINDINGS OF FACT

Substantial and competent evidence based upon the whole record supports the following findings of fact:

1. On February 28, 2005, following a hearing, the AHC issued a Decision finding cause to discipline Tenenbaum under § 337.035.2(5), (6), (10), and (13), RSMo.[1]

[1] Legal File ("L.F."), Volume ("Vol.") I, AHC Decision, p. 23.

2. On October 18, 2005, following a hearing, the SCOP issued Findings of Fact, Conclusions of Law and Disciplinary Order revoking Tenenbaum's license to practice as a psychologist.[2]

3. Tenenbaum holds a psychologist license that the SCOP issued to him in 1987.[3]

4. In the fall of 2002, Tenenbaum worked out at the fitness gym where a woman ("C.J.") was employed as a greeter at the front desk.[4]

5. C.J. is a divorced mother with a high school education and a few community college courses.[5]

6. In the weeks before November 19, 2002, Tenenbaum and C.J. talked before and after Tenenbaum's bi-weekly workouts.[6]

7. During these conversations, Tenenbaum mentioned that he was a psychologist[7] and that he treats people for anger, ADD, and newly-divorced women.[8]

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[2] L.F., Vol. I, SCOP Order, pp. 7-8.

[3] L.F., Vol. I, C.V. of Steven Tenenbaum, p. 1.

[4] L.F., Vol. II, Tr. 17:7.

[5] L.F., Vol. II, Tr. 17:25, 35:5, 117:20.

[6] L.F., Vol. II, Tr. 19:18, 21:6, 21:24, 298:25, 299:21.

[7] L.F., Vol. II, Tr. 300:9.

[8] L.F., Vol. II, Tr. 22:17, 29:25.

8. In these conversations, Tenenbaum and C.J. discussed C.J.'s personal problems.[9] C.J. mentioned that she would go to a therapist[10] but that her insurance would not cover it.[11]

9. Tenenbaum offered to trade psychological services for workout training services.[12] Tenenbaum also said that he sometimes offered his services for free.[13] Tenenbaum further stated that C.J. could be his or his office's special little project.[14]

10. In at least one conversation, Tenenbaum suggested that C.J. refer to herself as a goddess[15]--a positive self statement technique used by therapists.[16]

11. In another conversation, Tenenbaum described a method to C.J. illustrated with a "karate" move--a method utilized by therapists on how conflict can be managed without direct confrontation by deflecting the anger of others.[17]

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[9] L.F., Vol. II, Tr. 25:13, 43:22, 47:3, 64:24, 220:16, 221:22, 222:14, 306:4, 342:11.

[10] L.F., Vol. II, Tr. 162:1.

[11] L.F., Vol. II, Tr. 25:22, 27:7, 27:22, 160:10, 165:6, 221:18.

[12] L.F., Vol. II, Tr. 25:25.

[13] L.F., Vol. II, Tr. 51:8, 56:2, 160:15, 161:12, 161:18, 165:2, 169:7, 173:22, 174:9.

[14] L.F., Vol. II, Tr. 27:14, 56:2, 161:14, 309:10.

[15] L.F., Vol. II, Tr. 24:21, 36:10, 78:19, 301:25.

[16] L.F., Vol. II, Tr. 145:16, 278:24, 345:1.

[17] L.F., Vol. II, Tr. 23:21, 303:15, 340:6.

12. On November 19, 2002, during a conversation after his morning workout, Tenenbaum gave C.J. his business card[18] and asked her to stop by his office at 6:05 p.m. that evening.[19] Tenenbaum told C.J. to drink a lot of water and bring some Kleenexes.[20] Tenenbaum confirmed with C.J. that she knew how to get to his business building and to his individual office.[21]

13. C.J. went to Tenenbaum's office thinking that she would receive counseling.[22] C.J. had never received any type of therapy, counseling, or psychological services before.[23]

14. Upon her arrival, Tenenbaum was just coming out of his office with a female patient.[24] Tenenbaum took C.J. into his office and closed the door.[25] Tenenbaum said that when his door was closed he was in session and no one would come in.[26]

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[18] L.F., Vol. II, Tr. 28:19, 53:10.

[19] L.F., Vol. II, Tr. 28:24, 53:10, 93:10, 220:18.

[20] L.F., Vol. II, Tr. 29:3, 53:13.

[21] L.F., Vol. II, Tr. 28:20.

[22] L.F., Vol. II, Tr. 29:7, 44:10, 77:16, 81:18, 89:3, 91:8.

[23] L.F., Vol. II, Tr. 19, 48:15.

[24] L.F., Vol. II, Tr. 31:7.

[25] L.F., Vol. II, Tr. 31:21, 55:7, 222:6.

[26] L.F., Vol. II, Tr.85:19.

15. Although after office hours, other people were seeing clients in the office at that time, so Tenenbaum had to tell C.J. to "hush."[27] C.J. did not know this was after office hours.[28]

16. Tenenbaum explained to C.J. that he was doing this as a friend and that this was not on the books as she could not afford the hourly rate.[29]

17. Tenenbaum told C.J. that he wanted to help her work out her problems.[30]

18. Tenenbaum and C.J. then discussed C.J.'s personal problems for about 30 minutes.[31] Tenenbaum told C.J. to relax.[32]

19. Then Tenenbaum began making progressive sexual advances toward C.J.,[33] including multiple comments of a sexual nature;[34] hugging or pulling her towards him;[35]

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[27] L.F., Vol. II, Tr. 325:21.

[28] L.F., Vol. II, Tr. 55:4.

[29] L.F., Vol. II, Tr. 32:4, 55:12, 57:9.

[30] L.F., Vol. II, Tr. 64:24, 221:22.

[31] L.F., Vol. II, Tr. 32:19, 34:3, 222:14.

[32] L.F., Vol. II, Tr. 34:2, 35:1, 58:12, 60:19, 82:13.

[33] L.F., Vol. II, Tr. 14:11, 14:16, 35:9, 56:5, 218:3.

[34] L.F., Vol. II, Tr. 14:11.

[35] L.F., Vol. II, Tr. 72:24, 95:12.

kissing her;[36] feeling her breasts;[37] exposing her breasts;[38] kissing her nipples;[39] putting her hand on his unexposed, erect penis;[40] putting her knees on his shoulders and his head between her legs;[41] exposing his erect penis;[42] asking her to touch his erect penis;[43] and placing his erect penis between her legs.[44]

20. At the point where Tenenbaum was hugging C.J. he asked her if it felt good and she said yes.[45] At another point Tenenbaum asked C.J. whether she liked sex with her boyfriend to be gentle or rough–she replied that she liked it rough.[46] When Tenenbaum exposed his erect penis to C.J. and asked her to touch it, she did so for a second.[47]

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[36] L.F., Vol. II, Tr. 33:22, 56:9, 87:4, 95:12, 77:6.

[37] L.F., Vol. II, Tr. 58:18, 69:15, 95:20.

[38] L.F., Vol. II, Tr. 77:2.

[39] L.F., Vol. II, Tr. 77:6.

[40] L.F., Vol. II, Tr. 74:2, 74:12, 97:24.

[41] L.F., Vol. II, Tr. 74:7, 75:1.

[42] L.F., Vol. II, Tr. 15:01, 78:22, 97:11.

[43] L.F., Vol. II, Tr. 78:24, 97:15.

[44] L.F., Vol. II, Tr. 80:13.

[45] L.F., Vol. II, Tr. 57:21, 67:9.

[46] L.F., Vol. II, Tr. 76:2, 77:4.

[47] L.F., Vol. II, Tr. 15:01, 78:24, 79:16, 97:15.

21. C.J. told Tenenbaum to stop up to five separate times, and each time Tenenbaum did stop, but then resumed his sexual advances again shortly thereafter.[48]

22. Tenenbaum wanted to have sex with C.J.[49] Tenenbaum stated multiple times that he wanted C.J.'s passion.[50]

23. Throughout this session, Tenenbaum told C.J. that he wanted to help her.[51] Tenenbaum also repeatedly told C.J. that he wanted to help her get from point A to point B,[52] and that she would have to have sex with him to accomplish that[53].

24. C.J. realized that Tenenbaum just wanted to have sex with her and was not going to help her.[54]

25. Then Tenenbaum's pager went off; he said he didn't have to answer it; but C.J. said she had to go.[55]

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[48] L.F., Vol. II, Tr. 35:5, 35:20, 35:16, 56:12, 74:24, 323:3.

[49] L.F., Vol. II, Tr. 34:9, 71:23, 72:19, 76:9.

[50] L.F., Vol. II, Tr. 35:2, 57:13, 72:18, 306:10.

[51] L.F., Vol. II, Tr. 83:20, 84:2, 84;11.

[52] L.F., Vol. II, Tr. 34:8, 58:15, 70:24, 71:20, 76:9, 78:18, 82:14, 337:17.

[53] L.F., Vol. II, Tr. 71:23, 72:19, 76:9.

[54] L.F., Vol. II, Tr. 38:5, 86:2, 88:4, 89:8.

[55] L.F., Vol. II, Tr. 36:24, 37:3, 84:18.

26. While getting dressed, Tenenbaum, still not deterred, asked C.J. about a tattoo on her hip to which C.J. responded, "isn't that the cutest thing you ever seen?"[56] Tenenbaum then kissed his finger and tried to touch the tattoo, but C.J. pulled away.[57]

27. C.J. then said that if she were standing there naked in a fur coat, he would just want to have sex with her.[58]

28. Tenenbaum asked C.J. not to tell anyone, not to ruin his life, and to think of it as a dream.[59]

29. Tenenbaum told C.J. that he had done this before--had an affair with a person from his office--and that he had threatened the license of that person.[60] He added that he had told his wife about the affair and that she had forgiven him.[61]

30. C.J. left at about 7 p.m.[62] C.J. had no contact with Tenenbaum after that evening.[63]

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[56] L.F., Vol. II, Tr. 39:25, 86:6, 324:13.

[57] L.F., Vol. II, Tr. 87:4, 343:22.

[58] L.F., Vol. II, Tr. 38:3, 87:21, 224:23, 323:13.

[59] L.F., Vol. II, Tr. 37:12, 37:9, 37:10, 96:13, 98:15.

[60] L.F., Vol. II, Tr. 37:16, 37:19, 82:19, 83:15, 321:6, 321:22.

[61] L.F., Vol. II, Tr. 83:15.

[62] L.F., Vol. II, Tr. 83:1.

[63] L.F., Vol. II, Tr. 118:06.

31. The next day C.J. filed a police report.[64] The following week she filed a complaint with the SCOP.[65] In early December, C.J. began seeing a therapist.[66]

32. After November 19, 2002, C.J. began showing symptoms of post traumatic stress disorder (PTSD) in that she was crying, trembling, distraught, depressed, anxious, and wanted to stay in bed all day.[67]

33. The only facts set out above that Tenenbaum disputes is that he told C.J. that he would provide psychological services for free[68] and that he and C.J. discussed her personal problems in his office for about 30 minutes prior to the beginning of his sexual advances.[69]

CONCLUSIONS OF LAW

Jurisdiction

This Court has jurisdiction to hear this petition for judicial review pursuant to § 536.140, RSMo. This Court reviews the AHC and SCOP decisions together. *Larocca v. State Bd. of Registration for Healing Arts*, 897 S.W.2d 37, 39 (Mo. App. E.D. 1995).

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[64] L.F., Vol. II, Tr. 38:12.

[65] L.F., Vol. II, Tr. 38:15.

[66] L.F., Vol. II, Tr. 42:11, 107:3, 126:9, 127:8.

[67] L.F., Vol. II, Tr. 126:4, 133:6, 135:12, 137:18. Petitioner stipulated to the Jeane Caine's credentials. (L.F., Vol. II, Tr. 122:22, L.F., Vol. I, Exh. D).

[68] L.F., Vol. II, Tr. 296:11, 313:23.

[69] L.F., Vol. II, Tr. 319:6.

Standard of Review

The court reviews interpretations of law *de novo*, while "factual determinations are upheld if they are supported by the law and, after reviewing the whole record, there is substantial evidence to support them." *Murphy Co. Mech. Contractors and Eng'rs v. Dir. of Revenue*, 156 S.W.3d 339, 340 (Mo. banc 2005) (*quoting Southwestern Bell Tel. Co. v. Dir. of Revenue*, 78 S.W.3d 763, 765 (Mo. banc 2002)). Further, the court is

> [L]imited to determining whether the decision was supported by substantial and competent evidence; whether it was arbitrary, capricious or unreasonable; or whether the agency action constituted an abuse of discretion. We may not substitute our own judgment for that of the agency, and may not set aside the administrative decision unless it is clearly contrary to the overwhelming weight of the evidence. We defer to the agency's credibility determinations and, if the evidence supports either of two contrary conclusions, the agency's decision must prevail. It is only where the agency's findings are contrary to the determinative undisputed facts that the decision is arbitrary and unreasonable, and we must reverse.

Pleasant v. Missouri State Highway Patrol, 181 S.W.3d 243, 247 (Mo. App. W.D. 2006) (internal citations omitted).

Doctor/Patient Relationship Existed

Pursuant to *Corbet v. McKinney*, there are a number of considerations beyond the offer/acceptance analysis found in contract law for the court to consider towards the establishment of a doctor/patient relationship and the resulting duty. 980 S.W.2d 166, 169 (Mo. App. E.D. 1998). These considerations include "whether the physician undertakes to examine, diagnose, or treat the patient," "for these indicia of consent as well as other

evidence of a consensual relation[ship]," and whether the physician has ever "met, spoken with, or consulted the patient." *Id.* Some examples of actions that indicate knowing consent to treat a patient include "examining, diagnosing, treating, prescribing treatment for, or charging the patient." *Id.* at 170. Similarly, the "[c]reation of the physician-patient relationship does not require the formalities of a contract," that it may be express or implied, and that "[i]f there is no prior relationship between the physician and the patient, there must be some affirmative action on the part of the physician to treat the patient to create such a relationship." *Stutes v. Samuelson*, 180 S.W.3d 750, 753 (Tex. App. 2005).

Here, there were multiple affirmative actions on the part of Tenenbaum indicative of a professional relationship with C.J.--each supported by substantial and competent evidence based upon the whole record. Tenenbaum discussed C.J.'s personal problems with her at the gym and in his office.[70] Tenenbaum told C.J. that he wanted to help her work out her problems.[71] During their discussions, Tenenbaum utilized positive self statement techniques and recommended the "karate" technique to manage conflicts without direct confrontation by deflecting the anger of other--both of these techniques are used by therapists in treating patients.[72] And Tenenbaum testified that he has probably used these techniques in his

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[70] L.F., Vol. II, Tr. 25:13, 32:19, 47:3, 220:16, 222:14, 306:4, 342:11.

[71] L.F., Vol. II, Tr. 64:24, 221:22.

[72] L.F., Vol. II, Tr. 23:21, 145:16, 278:24, 303:15, 340:6.

practice.[73] Further, Tenenbaum testified that he was thinking about getting C.J. treatment and how it would work;[74] he gave C.J. his business card and invited her to his office;[75] he told her that he sometimes provided services for free[76] and that she was not on the books;[77] and he testified that the office is not the place where you normally have dates.[78] Therefore, there was substantial and competent evidence based upon the whole record supportive of the AHC's finding that there was a doctor/patient relationship between Tenenbaum and C.J.

Expert Testimony not Dispositive

Tenenbaum has argued that his expert's testimony is dispositive of this case because the testimony was not rebutted by an opposing expert. This Court rejects this argument. The existence of a doctor/patient relationship is a question of law. *Corbet v. McKinney*, 980 S.W.2d 166, 168-69 (Mo. App. E.D. 1998). Such questions of law are not beyond the competence of the AHC, or of this Court, and do not require expert testimony. Tenenbaum's attempt to equate this case with one regarding whether a doctor met a particular standard of care is misplaced. Moreover, while Dr. Welch testified that there could not be a finding of

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[73] L.F., Vol. II, Tr. 340:6, 345:1.

[74] L.F., Vol. II, Tr. 308:17, 310:3.

[75] L.F., Vol. II, Tr. 28:19, 28:20, 53:10, 316:10.

[76] L.F., Vol. II, Tr. 51:8, 56:2, 160:15, 121:12, 161:18, 165:2, 169:7, 173:22, 174:9.

[77] L.F., Vol. II, Tr. 32:4, 55:12, 57:9.

[78] L.F., Vol. II, Tr. 318:16.

a doctor/patient relationship based upon the facts presented in this case,[79] he also testified that he did not conclude that there was no psychologist/patient relationship.[80]

Typographical Errors

The typographical errors within the AHC and SCOP decisions highlighted by Tenenbaum are each harmless error. It is clear from the record and undisputed by the parties that the main events in this case took place on November 19, 2002, and not in 2003 as referenced by the decisions.[81]

Further, SCOP rejected Tenenbaum's assertion that the reason he did these things was because he was at a low level of his ADHD medication at that time of day.[82] SCOP rejected this excuse due to the amount of time between Tenenbaum's morning invite to C.J. and his evening session with her--time during which he was fully medicated and had ample time to consider and alter his plans. Such analysis applies equally whether to 2002 or 2003.[83] Thus, such an error does not affect the substantial and competent evidence based upon the whole record supportive of the AHC and SCOP decisions.

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[79] L.F., Vol. II, Tr. 273:17.

[80] L.F., Vol. II, Tr. 274:18.

[81] L.F., Vol. II, Tr. 10:25, 11:13, 18:23, 21:8, 24:9, 39:5, 43:9, 89:22, 100:25, 103:23, 104:14, 106:5, 118:2, 151:18, 160:7, 181:21, 208:25, 214:9, 215:13, 227:18, 298:7, 304:16, 317:24.

[82] L.F. Vol. I, SCOP Order, pp. 4-6.

[83] *Id.*

Police Report was Correctly Admitted,
and In Any Event, Detective Cintel Testified to the Same Evidence
from His Own Memory

Respondent offered into evidence and the AHC admitted a report prepared by Detective Cintel during his criminal investigation of this matter.[84] This report contains statements made to Detective Cintel by Tenenbaum in the course of his investigation, along with certain observations made by Detective Cintel.[85]

Section 536.070(10) provides for the admission of police reports even where the custodian or preparer does not testify to its foundation or authenticity. Section 536.070(10), RSMo 2000. Such reports are admissible if the administrative law judge determines "that it was made in the regular course of any business, and that it was the regular course of such business to make such . . . record at the time of such . . . transaction . . . or within a reasonable time thereafter." *State ex rel. Sure-Way Transp., Inc. v. Div. of Transp., Dep't of Econ. Dev.*, 836 S.W.2d 23, 26 (Mo. App. W.D. 1992). Further, circumstances of the making of such a report such as a "lack of personal knowledge by the . . . maker" may be used towards the weight of the evidence, but not towards its admissibility. Section 536.070(10), RSMo 2000. Respondent met the requirements of § 536.070(10) and the AHC properly admitted the report.

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[84] L.F., Vol. II, Tr. 211:16, 213:12; L.F. Vol. I, Police Report-Exh. A; L.F. Vol. I, AHC Decision, pp. 8-12.

[85] L.F. Vol. I, Police Report-Exh. A

The rule applicable in Missouri courts excludes "content of a police report which was not the result of the reporting officer's own observations, but was the product of statements made to the officer by third persons" *Edgell v. Leighty*, 825 S.W.2d 325, 329 (Mo. App. S.D. 1992). The report here contained both. Thus, if this report were offered for admission before a circuit court, portions of it may be inadmissible. However, this case was tried before the AHC, which is governed by the specific provisions set out within Chapter 536. As Respondent met the requirements of Chapter 536, the report was properly admitted.

Additionally, Detective Cintel testified based upon his own memory regarding the statements made directly to him by Tenenbaum and covered essentially the same evidence.[86] Such statements by Tenenbaum are admissions against interest and were properly admitted.

Tenenbaum objected multiple times at hearing to the admission of the police report.[87] However, the AHC hearing transcript reflects over five pages of testimony (pp. 220 to 225) by Detective Cintel with no objections of any kind.[88] And there is no request by Tenenbaum for an ongoing objection regarding all of Detective Cintel's testimony. Further, an objection made at the end of a witness' testimony to all of that witness' testimony preserves nothing

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[86] L.F., Vol. II, Tr. 219:5.

[87] L.F., Vol. II, Tr. 210+.

[88] L.F., Vol. II, Tr. 220-225.

for judicial review because it is not raised at the earliest available time. Thus, Petitioner failed to properly preserve such objections for judicial review and has waived same.

Furthermore, even absent the police report and absent the testimony by Detective Cintel, there remains substantial and competent evidence based upon the whole record supporting the AHC and SCOP Decisions.

SCOP's Decision to Revoke Tenenbaum's License was Within their Discretion and was Valid

The SCOP issued its discipline order on October 18, 2005.[89] The SCOP's order followed the September 9, 2005 hearing before SCOP.[90] At this hearing, the AHC Decision was admitted and considered, as was testimony from Tenenbaum and letters supportive of Tenenbaum.[91] SCOP members actively questioned Tenenbaum at the hearing.[92] And the parties' respective counsel presented opening and closing statements.[93] SCOP then, following deliberation, issued their Order that included revocation of Tenenbaum's license to practice as a psychologist in Missouri.[94]

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[89] L.F., Vol. I, SCOP Order.

[90] *Id.* at 2.

[91] L.F., Vol. I, SCOP Order.

[92] L.F., Vol. III, Tr. pp. 18-40.

[93] L.F., Vol. III, Tr. pp. 8-9, 41-45.

[94] L.F., Vol. I, SCOP Order, p. 8. Even Dr. Welch testified that, if there were a psychologist/patient relationship, then engaging in the actions that Tenenbaum did would be a violation of law and ethics. L.F., Vol. II, Tr. 280:21.

Thus, SCOP followed a specific procedure in reviewing and deciding discipline. *See Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266, 281 (Mo. App. W.D. 2000). SCOP's decision was based upon substantial and competent evidence as set out in detail above. SCOP considered the AHC Decision, the testimony of Tenenbaum, and the supporting letters that he provided.[95] In their findings, SCOP expressed a concern towards Tenenbaum's ability to prevent himself from committing similar violations in the future.[96] SCOP found that Tenenbaum's violations harmed the trust placed in him by the psychology profession and by the public.[97] SCOP found that Tenenbaum had not accepted responsibility for his conduct and had shown no remorse.[98]

Revocation is one of the types of discipline available to SCOP as specifically provided in § 337.035.3. That was the discipline imposed upon Tenenbaum by SCOP.[99] Thus, SCOP's Order is not arbitrary or capricious, or issued without any guidelines or criteria. Tenenbaum even admitted in his brief that his conduct was inappropriate.

Tenenbaum's allegation that revocation of his license is unfair when compared to other disciplined psychologists is not well founded. Tenenbaum correctly argued at oral

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[95] L.F., Vol. I, SCOP Order.

[96] *Id.* at 7.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 7-8.

argument that this is a unique case. Thus, by his own admission, it is not comparable to other cases. Given the wide range of situations, defenses, explanations, and settlements that can arise across a range of hand-selected cases, it is not surprising that discipline varies. *See Massey v. Missouri Dental Bd.*, 698 S.W.2d 562, 564 (Mo. App. E.D. 1985). Moreover, attaching to a legal brief evidence reflecting discipline in other cases does not properly place that evidence before the court for consideration, absent a full evidentiary hearing. *Missouri State Bd. of Registration for the Healing Arts v. Brown*, 121 S.W.3d 234, 237 (Mo. banc 2003).

Tenenbaum raised for the first time at oral argument before this Court that the SCOP decision is invalid because it is signed by the SCOP Executive Director instead of by the SCOP or one of its members. However, SCOP is not a court, does not have the powers of a court, and it is not subject to the requirements as set out in Rule 74.01. Thus, there can be no "judgment" that is required to be signed by SCOP as set out in that Rule.

Moreover, the SCOP's order was issued by SCOP following a full hearing before SCOP, is in writing and is signed by the SCOP's Executive Director as delegated by SCOP. The ministerial duty of signing the written decision issued by SCOP may be delegated even where not explicitly stated in statute. *See McGull v. St. Louis Board of Police Commissioners*, 178 S.W.3d 719, 723 (Mo. App. E.D. 2005). Such authority to delegate "may be implied if there is a reasonable basis for such implication." *Id.* (internal quotations omitted). While a committee or commission's hearing authority itself may not be delegated,

ministerial acts can be so delegated. *Brown Group v. Admin Hearing Comm'n*, 649 S.W.2d 874, 878 (Mo. banc 1983) (finding that signing an additional tax assessment was a ministerial act, may be delegated, and that such assessments were not void for the lack of the signature of the Director of Revenue). Thus, the SCOP Executive Director may sign the SCOP's decision. Consequently, the order is valid.

For all of these reasons, SCOP's order was not arbitrary or capricious, is supported by substantial and competent evidence based upon the whole record through a well established and specific process, and is valid.

Summary

There is substantial and competent evidence based upon the whole record supportive of the AHC's determination that a doctor/patient relationship existed between Tenenbaum and C.J.

And there is substantial and competent evidence based upon the whole record supportive of the AHC's finding of cause to discipline Tenenbaum for violations of § 337.035.2(5), (6), (10), and (13).

And there is substantial and competent evidence based upon the whole record supportive of the SCOP's revocation of Tenenbaum's license to practice psychology.

And the AHC and SCOP decisions contained no violation of constitutional provisions, no action in excess of statutory authority or jurisdiction of the agency, no action unauthorized

by law, no unlawful procedure, no unfair trial, were not arbitrary, capricious or unreasonable, and did not involve an abuse of discretion.

Accordingly, the AHC decision and the SCOP order are AFFIRMED.

Thomas J. Brauer
Judge

May 17, 2006
Date

STATE OF MISSOURI } SS
COUNTY OF COLE

I, BRENDA A. UMSTATTD, Clerk of the Circuit Court of Cole County, Missouri, hereby certify that the above and foregoing is a full true and correct copy of

Judgment

as fully as the same remains of record in my said office.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of my said office this 17 day of May '06.
BRENDA A. UMSTATTD, Clerk

Deputy Clerk
Circuit Court of Cole County, Missouri

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STEVEN J. TENENBAUM, Ph.D.,	)	
	)	
Appellant,	)	
v.	)	**WD 67237**
	)	
	)	**ORDER FILED:**
MISSOURI STATE COMMITTEE OF PSYCHOLOGISTS,	)	**June 29, 2007**
	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Thomas J. Brown, III, Judge

Before: Smart, P.J., and Ellis and Smith, JJ.

Order

Per Curiam

Steven J. Tenenbaum appeals the judgment of the Circuit Court of Cole County affirming the decision of the Administrative Hearing Commission (AHC), that his license as a psychologist, which was issued pursuant to **§ 337.020.3** by the Missouri State Committee of Psychologists (Committee), was subject to disciplinary action by the Committee, as authorized by **§ 337.035.3**. Pursuant to a complaint filed by the Committee with the AHC, as authorized by **§ 337.035.2**, the AHC found that the conditions for disciplinary action, found in **subsections (5), (6), (13),** and **(15)** of **§ 337.035.2**,

had been met. Accordingly, the Committee, as authorized by § **337.035.3**, revoked the appellant's license.

The appellant raises five points on appeal, claiming error by the *circuit court*. However, our review is of the decision of the AHC, not the judgment of the circuit court. § **621.145; *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 453 (Mo. App. 2001).** As such, the appellant's points are technically deficient under **Rule 84.04(d)(2)**, which reads: "Where the appellate court reviews the decision of an administrative agency, rather than a trial court, each point shall: (A) *identify the administrative ruling or action the appellant challenges*[.]" (Emphasis added.) However, although the appellant's points are technically deficient, in that they do not challenge the decision of the AHC, finding that his license was subject to disciplinary action by the Committee, as authorized in § **337.035.3**, because it is sufficiently clear from his argument in each point that he is, in fact, attacking that decision, we will review his points on the merits.

In Point I, the appellant claims that the AHC erred in finding and concluding that his license was subject to disciplinary action by the Committee, as authorized by § **337.035.3**, including revocation, on the grounds that he violated **subsections (5), (6), (13)**, and **(15)** of § **337.035.2**, because there was no evidence in the record, as required in order to revoke his license, demonstrating that, at the time in question, he had established a "psychologist/client relationship" with the complaining witness such that he owed her a duty not to engage in any of the prohibited conduct set forth in § **337.035.2**. In Point II, he claims that the AHC erred in admitting and considering, over his objection, the testimony of Detective Steven Cintel, of Town and County Police Department, regarding statements the appellant made to him about the incident and his report summarizing those statements because it was inadmissible hearsay and no hearsay exception applied. In Point III, he

claims that the revocation of his license, pursuant to § **337.035.3**, was unconstitutional because it was "disproportionate to the alleged offense and violated [his] due process and equal protection rights, in that no other psychologist has ever had a license revoked for a first offense-dual relationship violation and no justification for the excessive punishment of this appellant has been presented." In Point IV, he claims that the AHC erred in deciding that he was subject to discipline by the Committee, pursuant to § **337.035.3** for violating **subsections (5), (6), (13),** and **(15)** of § **337.035.2** because the AHC's required findings of fact, in support of its decision, were "plainly incorrect on matters critical to the disciplinary decision of revocation." In Point V, he claims that the Committee's order of revocation, pursuant to § **337.035.3**, is void, *ab initio*, because, contrary to the authority granted the Committee in § **337.035.3** to revoke his license, the order of revocation was signed by the executive director of the Committee rather than the Committee.

We affirm pursuant to **Rule 84.16(b)**.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STEVEN J. TENENBAUM, Ph.D.,	)	
	)	
Appellant,	)	
v.	)	WD 67237
	)	
	)	ORDER FILED:
MISSOURI STATE COMMITTEE OF PSYCHOLOGISTS,	)	June 29, 2007
	)	
	)	
Respondent.	)	

Memorandum Supplementing Order
Affirming Judgment Pursuant to Rule 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Steven J. Tenenbaum appeals the judgment of the Circuit Court of Cole County affirming the decision of the Administrative Hearing Commission (AHC), that his license as a psychologist, which was issued pursuant to **§ 337.020.3**[1] by the Missouri State Committee of Psychologists (Committee), was subject to disciplinary action by the Committee, as authorized by **§ 337.035.3**. Pursuant to a complaint filed by the Committee with the AHC, as authorized by **§ 337.035.2**, the AHC found that the conditions for disciplinary action, found in **subsections (5), (6), (13),** and **(15)**[2] of **§ 337.035.2,** had been met. Accordingly, the Committee, as authorized by **§ 337.035.3**, revoked the appellant's license.

The appellant raises five points on appeal, claiming error by the *circuit court*. However, our review is of the decision of the AHC, not the judgment of the circuit court. **§ 621.145; *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 453 (Mo. App. 2001).** As such, the appellant's points are technically deficient under **Rule 84.04(d)(2)**, which reads: "Where the appellate court reviews the decision of an administrative agency, rather than a trial court, each point shall: (A) *identify the administrative ruling or action the appellant challenges*[.]" (Emphasis added.) However, although the appellant's points are technically deficient, in that they do not challenge the decision of the AHC, finding that his license was subject to disciplinary action by the Committee, as authorized in **§ 337.035.3**, because it is sufficiently clear from his argument in each point that he is, in fact, attacking that decision, we will review his points on the merits.

In Point I, the appellant claims that the AHC erred in finding and concluding that his license was subject to disciplinary action by the Committee, as authorized by **§ 337.035.3**, including

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[1] All statutory references are to **RSMo, 2000**, unless otherwise indicated.

[2] The AHC's decision refers to a violation of **§ 337.035.2(10)**, rather than **(15)**, as one of the grounds for the Committee to discipline the appellant. However, the Committee's complaint and the AHC's conclusions of law make it clear that **§ 337.035.2(15)**, rather than **(10)**, was a ground for disciplining. Hence, our review includes **§ 337.035.2(15)**

revocation, on the grounds that he violated **subsections (5), (6), (13),** and **(15)** of **§ 337.035.2,** because there was no evidence in the record, as required in order to revoke his license, demonstrating that, at the time in question, he had established a "psychologist/client relationship" with the complaining witness such that he owed her a duty not to engage in any of the prohibited conduct set forth in **§ 337.035.2**. In Point II, he claims that the AHC erred in admitting and considering, over his objection, the testimony of Detective Steven Cintel of the Town and County Police Department regarding statements the appellant made to him about the incident and his report summarizing those statements because it was inadmissible hearsay and no hearsay exception applied. In Point III, he claims that the revocation of his license, pursuant to **§ 337.035.3**, was unconstitutional because it was "disproportionate to the alleged offense and violated [his] due process and equal protection rights, in that no other psychologist has ever had a license revoked for a first offense-dual relationship violation and no justification for the excessive punishment of this appellant has been presented." In Point IV, he claims that the AHC erred in deciding that he was subject to discipline by the Committee, pursuant to **§ 337.035.3** for violating **subsections (5), (6), (13),** and **(15)** of **§ 337.035.2** because the AHC's required findings of fact, in support of its decision, were "plainly incorrect on matters critical to the disciplinary decision of revocation." In Point V, he claims that the Committee's order of revocation, pursuant to **§ 337.035.3**, is void, *ab initio*, because, contrary to the authority granted the Committee in **§ 337.035.3** to revoke his license, the order of revocation was signed by the executive director of the Committee rather than the Committee.

We affirm.

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as a ground, but not **§ 337.035.2(10)**.

Facts

Pursuant to **Chapter 337**, the Committee is responsible for issuing and regulating the licenses of psychologists in the state of Missouri. In 1987, the Committee issued the appellant a license to practice psychology. The appellant held this license until it was revoked on October 18, 2005, after a complaint was filed by the Committee with the AHC, alleging various violations by the appellant of **§ 337.035.2**, by engaging in sexual conduct with a client, CJ.

In the fall of 2002, the appellant purchased a membership at 24-Hour Fitness in Chesterfield, Missouri. CJ was employed at 24-Hour Fitness as the front desk receptionist. She worked the morning shift and her responsibilities included greeting members and checking them in. The appellant scheduled sessions with a personal trainer at 6 a.m. on Tuesdays and Thursdays. When the appellant entered the gym, he and CJ would engage in casual conversation.

During one of the appellant's morning conversations with her, CJ mentioned to him that she was having problems with her ex-husband. The appellant informed her that he was a therapist who helped people with their anger management problems. Over the next few weeks, the appellant and CJ would casually discuss her problems. The appellant told her that she needed to learn how to deflect her anger, and he taught her a karate move to show her that she must deflect her anger like a karate fighter deflects the force of an opponent. He also told her that she needed a positive attitude and to repeat to herself out loud: "I am a goddess."

On November 19, 2002, the appellant went to 24-Hour Fitness for his personal training session. When he arrived, CJ informed him that his personal trainer had called in sick. She told him that she did not call him because she looked forward to talking to him. They then began to discuss her personal problems. CJ told the appellant that she would go to a therapist, but her insurance

would not cover it. The appellant informed her that he would be willing to trade therapist sessions for personal training sessions, but the victim stated that she could not arrange such a trade. At that time, another club member came up to the front desk, and the appellant started a conversation with her. CJ took a few moments to scan in other members and then rejoined the conversation with the appellant. CJ reiterated that she would like to see a therapist, but could not afford it because it was not covered by her insurance. The appellant told her that, even though it upset his wife, he sometimes saw patients for free. The appellant offered to see CJ for free and told her that she would be "my special little project," to which the victim responded, "Great." Later, on his way out of the gym, the appellant gave CJ his business card and told her to be at his office that night at 6:05 p.m.

CJ arrived at the appellant's office shortly before 6:00 p.m. When she arrived, the appellant came out of his office with a client. He said goodbye to that client and told CJ to come back to his private office. He told her to make herself comfortable. The appellant reiterated the fact that she was "not on the books" because she could not afford his fees. After that, they discussed her personal problems.

After approximately thirty minutes of discussing CJ's personal problems, the appellant rolled his chair over to where the victim was sitting. He told her that he could help her get from "A to B," but she would have to have sex with him. The appellant began kissing her and told her that he wanted her passion. CJ asked the appellant to stop. The appellant hugged her and then moved his hands to her breast. The appellant unbuttoned CJ's shirt. She again told him to stop. The appellant took the victim's left hand and put it on his trousers, over his erect penis. He told CJ, "Look what you do to me." CJ removed her hand. The appellant knelt in front of CJ and put her knees on his

shoulders. He put his mouth between her legs and told her that he wanted to taste her. She put her legs down.

The appellant asked CJ how she liked to have sex with her boyfriend, and she said that she liked to be on top. He started to rub her nipples and took one of her breasts out of her bra. He asked her if she liked gentle or rough sex with her boyfriend, to which she replied that she liked it rough. The appellant started to kiss her nipples, but CJ told him to stop and he did. The appellant told her that he could get her from "A to B," but it might take a few times. The appellant told her that he needed to show her what she did to him so he unzipped his pants and exposed his erect penis. He told her to touch it to see how big it was, and she did for a second. He informed her that she would not be able to keep up with him. She told him that her boyfriend had no complaints. The appellant put his penis between her legs and told her to look at what she could have that night. He asked if she was wet to which, she replied yes. She told him to stop, and he stood up and put his penis back in his pants.

CJ told the appellant that she needed to leave to take care of her children. The appellant told her that he had an affair with someone in his office and it lasted a year and a half. CJ asked if he was still seeing her, and he said no. He explained to her that this woman had tried to ruin his life when he ended the affair. The appellant told her to think of this incident as a dream and not tell anyone because he did not want to go through that situation again.

As CJ unzipped her pants to tuck in her shirt, the appellant noticed her tattoo of a heart. She asked him if that was the cutest thing he had ever seen. He replied that it was and kissed his fingers. He tried to touch his fingers to the tattoo, but CJ would not let him. He asked to taste her, but she

said no. CJ asked if she came to his office naked with a fur coat, whether he would want to have sex with her. The appellant tried to explain that he just wanted to help her work out her problems.

CJ left and had no further contact with the appellant. The next day, on the advice of a friend, the victim went to Town and County Police Department to report the incident. She spoke with Detective Steven Cintel who took her statement. On November 21, 2002, Detective Cintel interviewed the appellant. At the conclusion of the interview, Detective Cintel arrested the appellant for sexual misconduct in the first degree in violation of **§ 566.090**. After an investigation, the State declined to file a charge against the appellant.

On November 25, 2002, CJ traveled to Jefferson City, Missouri, and filed a complaint with the Committee alleging that the appellant violated **subsections (5), (6), (13),** and **(15)** of **§ 337.035.2,** by engaging in sexual conduct with her. On October 31, 2002, pursuant to **§ 337.035.2**, the Committee filed a complaint with the AHC against the appellant. On September 1, 2004, the AHC held a hearing at which CJ, Cintel, and the appellant testified. On February 28, 2005, the AHC found that the appellant had violated **§ 337.035.2** as charged in the complaint in that "he offered free psychological services to a woman as a pretext to induce her to become his client and then had sexual contact with her after she became his client," and, as such, was subject to disciplinary action by the Committee, as authorized by **§ 337.035.3**. On October 18, 2005, the Committee issued its disciplinary order, signed by its executive director, revoking the appellant's license.

On October 20, 2005, the appellant filed a petition for judicial review in the Circuit Court of Cole County, which was heard by the court on May 17, 2006. The trial court affirmed the decision of the AHC..

This appeal follows.

I.

In Point I, the appellant claims that the AHC erred in finding and concluding that his license was subject to disciplinary action by the Committee, as authorized by § 337.035.3, including revocation, on the grounds that he violated **subsections (5), (6), (13),** and **(15)** of § 337.035.2, because there was no evidence in the record, as required in order to revoke his license, demonstrating that, at the time in question, he had established a "psychologist/client relationship" with the complaining witness such that he owed her a duty not to engage in any of the prohibited conduct set forth in § 337.035.2. In claiming that the evidence was insufficient to revoke his license on the grounds found by the AHC, the appellant, in effect, asserts two sub-points: (1) that the Committee was required, but failed, to present expert testimony establishing the standard as to what constituted the "existence of a psychologist/patient relationship"; and (2) that the Committee was required, but failed, to present any evidence that he "intended to establish a professional relationship with the complaining witness."

The purpose of the AHC is to provide a method for unbiased administrative review of actions of licensing boards, such as the Committee. ***Geriatric Nursing Facility, Inc. v. Dep't of Soc. Servs.*, 693 S.W.2d 206, 209 (Mo. App. 1985).** Pursuant to § 337.035.2, the Committee may file a disciplinary complaint with the AHC against any licensed psychologist, such as the appellant, for any one or any combination of the fifteen enumerated causes. Upon the filing of a complaint by the Committee, the AHC is required to hold a contested hearing, and enter findings of fact and conclusions of law, pursuant to **Chapter 536. § 621.135; *Tendai v. Mo. St. Bd. of Registration for the Healing Arts*, 161 S.W.3d 358, 364 (Mo. App. 2005).** If the AHC finds that one or more of the

grounds of § **337.035.2** has been met for disciplinary action by the Committee, the Committee can then proceed to discipline the licensee, in accordance with § **337.035.3**.

Section 621.145 governs judicial review of decisions of the AHC, unless otherwise provided by law. **Section 621.145** reads:

> Except as otherwise provided by law, all final decisions of the administrative hearing commission shall be subject to judicial review as provided in and subject to the provisions of sections 536.100 to 536.140, RSMo, except that in cases where a disciplinary order may be entered by the agency, no decision of the administrative hearing commission shall be deemed final until such order is entered. For purposes of review, the action of the commission and the order, if any, of the agency shall be treated as one decision. The right to judicial review as provided herein shall also be available to administrative agencies aggrieved by a final decision of the administrative hearing commission.

Thus, our review, here, is under § **536.140**, to determine whether the AHC's decision, that the appellant was subject to disciplinary action by the Committee, under § **337.035.3**:

> (1) Is in violation of constitutional provisions;
> (2) Is in excess of the statutory authority or jurisdiction of the agency;
> (3) Is unsupported by competent and substantial evidence upon the whole record;
> (4) Is, for any other reason, unauthorized by law;
> (5) Is made upon unlawful procedure or without a fair trial;
> (6) Is arbitrary, capricious or unreasonable;
> (7) Involves an abuse of discretion.

On appeal, the decision of the AHC is presumed valid and the burden is on the opposing party to overcome that presumption. ***Dorman*, 62 S.W.3d at 453.** We review factual findings to determine whether they are supported by substantial evidence. ***Tendai*, 161 S.W.3d at 364.** When the decision of the AHC is based on an interpretation of law or the application of facts to law, then we review the decision *de novo*. ***Id.***

In its complaint against the appellant, the Committee alleged, generally, that he should be disciplined, as a licensed psychologist, in violation of § **337.035.2**, for offering free psychological

services to CJ as a pretext to induce her to become his client and then to engage in sexual conduct with her. The AHC agreed with the Committee and concluded that the appellant was subject to disciplinary action on the grounds found in **subsections (5),**[3] **(6),**[4] **(13),**[5] and **(15)**[6] of **§ 337.035.2** for offering CJ "free psychological services . . . as a pretext to induce her to become his client and then had sexual contact with her after she became his client." As stated, *supra*, the appellant claims on appeal, in two sub-points, that the record was insufficient to support the AHC's decision because there was nothing in the record demonstrating that he ever established a psychologist/client relationship with CJ, subjecting him to discipline for one or more of the violations found by the AHC.

A. Expert Testimony to Establish Standard for Determining Existence of Psychologist/Client Relationship

In his first sub-point, the appellant claims that the AHC erred in deciding that he was subject to disciplinary action by the Committee, on the grounds found, because the Committee did not present any expert testimony establishing what constituted a psychologist/client relationship that was governed by **§ 337.035.2**. While we would agree that the Committee, in order to discipline the appellant, pursuant to **§ 337.035.3**, had the burden before the AHC to show that at the time in question, a psychologist/client relationship existed between CJ and him, *see* ***State Bd. of Nursing v.***

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[3] **Section 337.035.2(5)** authorizes the AHC to find that the Committee has cause to discipline a licensee for "[i]ncompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter[.]"

[4] **Section 337.035.2(6)** authorizes the AHC to find that the Committee has cause to discipline a licensee for "[v]iolation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter[.]" The specific regulation found to have been violated was **Committee regulation 20 CSR 2235-5.030(5)(c)**, which outlines the "Ethical Rules of Conduct," and prohibits, *inter alia*, sexual conduct with a current client. **Committee regulation 20 CSR 2235-5.030(5)(c)** was previously numbered **4 CSR 2235-5.030(5)(c)**.

[5] **Section 337.035.2(13)** authorizes the AHC to find that the Committee has cause to discipline a licensee for "[v]iolation of any professional trust or confidence[.]"

***Berry*, 32 S.W.3d 638, 642 (Mo. App. 2000)** (holding that the burden of proof rests with the agency), we do not agree that it had to be established by expert testimony.

In support of his claim in this sub-point, the appellant cites ***Tendai v. Missouri State Board of Registration for the Healing Arts*, 161 S.W.3d 358, 367 (Mo. *banc* 2005)**. However, as he readily concedes, ***Tendai*** was not a disciplinary action, brought pursuant to **§ 337.035**, but was a malpractice action. And, any fair reading of ***Tendai*** reflects that in holding that expert testimony was required, the Court was referencing the issue of what was the requisite "standard of care" required of a psychologist with respect to an existing client and not the issue of whether a psychologist/client relationship, in fact, existed, the issue raised by the appellant here. ***Tendai*, 161 S.W.3d at 367.** Hence, ***Tendai*** is of no help to the appellant, and we can find no cases that have held as the appellant contends.

Section 337.050.9 provides:

> In addition to the powers set forth elsewhere in sections 337.010 to 337.090, the division may adopt rules and regulations, not otherwise inconsistent with sections 337.010 to 337.090, to carry out the provisions of sections 337.010 to 337.090. The committee may promulgate, by rule, "Ethical Rules of Conduct" governing the practices of psychology which rules shall be based upon the ethical principles promulgated and published by the American Psychological Association.

Accordingly, the Committee promulgated **20 CSR 2235-5.030**, setting forth the "Ethical Rules of Conduct" for a licensed psychologist. The definitions for the rules are found in **20 CSR 2235-5.030(2)**. And, a "professional relationship," for purposes of the rules, is defined in **20 CSR 2235-5.030(2)(E)** as a "mutually agreed upon relationship between a psychologist and a client(s) for the purpose of the client(s) obtaining the psychologist's professional expertise." Given this

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[6] **Section 337.035.2(15)** authorizes the AHC to find that the Committee has cause to discipline a licensee "[b]eing guilty of unethical conduct as defined in 'Ethical Rules of Conduct' as adopted by the committee and filed with the secretary of state[.]"

straightforward and clear definition, we fail to see how the AHC would have required expert testimony to understand it. Generally, expert testimony on an issue in a civil case is not required unless the witness' "scientific, technical, or other specialized knowledge will assist the trier of fact's understanding of the evidence or determination of a fact in issue." ***Thomas v. Festival Foods*, 202 S.W.3d 625, 627 (Mo. App. 2006).**

For the reasons given, we find no merit in the appellant's contention that the Committee, in order to revoke his license on the grounds found by the AHC, was required to prove, *inter alia*, with expert testimony, that at the time in question, he had established a psychologist/client relationship with CJ.

Sub-point denied.

B. Evidence that Appellant Intended to Establish Professional Relationship with Complaining Witness

In his second sub-point, the appellant claims that the evidence was insufficient to revoke his license on the grounds found by the AHC, because the Committee was required, but failed, to present any evidence that he "intended to establish a professional relationship with the complaining witness." The AHC found and concluded otherwise. In that regard, the AHC found and concluded that: "He offered free psychological services to a woman as a pretext to induce her to become his client and then had sexual contact with her after she became his client." Employing the definition of a "professional relationship," found in **20 CSR 2235-5.030(2)(E)**, a "mutually agreed upon relationship between a psychologist and a client(s) for the purpose of the client(s) obtaining the psychologist's professional expertise," there is ample evidence in the record to support the AHC's findings and conclusions that the appellant was subject to discipline by the Committee.

In reviewing the record to determine whether there is evidence to support the fact that, at the time in question, a psychologist/client relationship existed between CJ and the appellant, such that the appellant could be disciplined by the Committee for **subsections (5), (6), (13),** and **(15)** of **§ 337.035.2**, we view it in a light most favorable to the Committee. ***KV Pharm. Co. v. Mo. State Bd. of Pharmacy*, 43 S.W.3d 306, 310 (Mo. *banc* 2001).** In that light, the record reflects that after several casual conversations with the appellant regarding her ex-husband and her anger toward him, CJ told the appellant that she wanted to go to therapy, but it was not covered by her insurance. The appellant volunteered to trade his services for personal training sessions, but CJ told him that she could not arrange that trade. In addition, Detective Steve Cintel, who interviewed the appellant, testified that the appellant told him that he volunteered his professional services to help CJ because he was interested in having a romantic relationship with her. The admissibility of this evidence is challenged, *infra*, in Point II; however, we find that it was admissible. It can be reasonably inferred from CJ and Cintel's testimony that the appellant was attempting to solicit CJ as a client. On the appellant's next visit to the gym, he told CJ that he sometimes took on new patients for free. In that regard, he told her, "I would see you as a patient. You'll be my special little project." CJ responded by saying that that was great because her insurance would not cover it. Later that night, CJ appeared at the appellant's office at his invitation. After first establishing that her session would be free, they discussed her personal problems for thirty minutes. From that evidence, it not only can be reasonably inferred that the appellant was offering his counseling services for free and that CJ accepted his offer, creating a mutually agreed-upon relationship between them for the purpose of CJ obtaining the appellant's professional expertise, but that the appellant actually performed an

affirmative act in furtherance of that professional relationship by providing psychological services to CJ.

When viewed as a whole, the record was sufficient to support the AHC's findings and conclusions that a psychologist/client relationship existed between the appellant and the complaining witness at the time in question such that the AHC did not err in determining that the appellant was subject to disciplinary action by the Committee, pursuant to **§ 337.035.3** on the basis asserted in this sub-point.

Sub-point denied.

II.

In Point II, the appellant claims that the AHC erred in admitting and considering, over his objection, the testimony of Detective Steven Cintel of the Town and County Police Department regarding statements the appellant made to him about the incident and his report summarizing those statements because it was inadmissible hearsay and no hearsay exception applied. We disagree.

At the hearing on the Committee's complaint, the Committee called Cintel, who testified, *inter alia*, that he interviewed CJ twice and the appellant once. He testified, over the appellant's hearsay objection, that the appellant told him that he volunteered his professional services to help the complaining witness because he was interested in having a romantic relationship with her. Cintel also testified, over the appellant's objection:

> He told me a number of different times that he felt that she was coming on to him in these conversations that they had had at the health club, that he saw this particular day as an opportunity to have sex with her and that he used his office as a way of -- or he used his office as a place to go for this as a way to impress her so that he could have sex with her.

The Committee also introduced, over the appellant's hearsay objection, Cintel's report, Exhibit A, summarizing his interview with the appellant. In the report, the appellant admitted that he invited the complaining witness to come to his office so he could have sex with her. The report also indicated that he had admitted to engaging in numerous sexual acts with her. Essentially, the report corroborated the entire testimony of CJ. In the case of both objections, the AHC allowed the evidence subject to the appellant's objections. The appellant claims that Cintel's testimony and Exhibit A should have been excluded as being hearsay.

Hearsay is an out-of-court statement used to prove the truth of the matter asserted. ***United Mo. Bank v. City of Grandview*, 179 S.W.3d 362, 371 (Mo. App. 2005).** If a witness offers an out-of-court statement of another person to prove the truth of the matter asserted, then the witness' statement is hearsay and is inadmissible, unless a hearsay exception applies. ***Id.*** In the context of an administrative hearing, hearsay testimony does not qualify as competent and substantial evidence to support an agency's decision. ***Dorman*, 62 S.W.3d at 454.** However, when no objection is made, hearsay evidence can be considered by the agency in its decision. ***Id.***

In its conclusions of law, the AHC determined that Cintel's testimony concerning the appellant's statements to him and Exhibit A were admissible as admissions of a party opponent and under **§ 536.070(10)**, the business records exception to the hearsay rule. We concur.

One of the recognized exceptions to the hearsay rule is the admission of a party opponent. ***Doe v. McFarlane*, 207 S.W.3d 52, 72 (Mo. App. 2006); *Overland Outdoor Adver. Co., Inc. v. State ex rel. Mo. Highway and Transp. Comm'n*, 877 S.W.2d 158, 160 (Mo. App. 1994).** In order to be considered as an admission of a party opponent, the testimony must meet three requirements:

> First, the admission must be a conscious or voluntary acknowledgment by a party-opponent of the existence of certain facts.... Second, the matter acknowledged

> must be relevant to the cause of the party offering the admission.... Finally, the matter acknowledged must be unfavorable to, or inconsistent with, the position taken at trial by the party-opponent.

***Doe*, 207 S.W.3d at 72** (internal citations omitted). Cintel's testimony and Exhibit A satisfy all three requirements.

Both Cintel's challenged testimony and Exhibit A detail the appellant's conscious acknowledgement of the fact that he offered his professional services to CJ in an attempt to have sex with her and that he, in fact, engaged in numerous sexual acts with her. Those facts are obviously relevant to whether he violated **subsections (5), (6), (13),** and **(15)** of **§ 337.035.2**, as found by the AHC, by engaging in sexual acts with a client, the complaining witness. And, those facts are obviously unfavorable to the position he took at the hearing, that he did not offer professional services to the complaining witness and she was not his client. Hence, Cintel's testimony and Exhibit A were admissible as admissions of a party opponent. As such, the AHC did not err in admitting and considering Cintel's testimony and Exhibit A in arriving at its decision.

Point denied.

III.

In Point III, the appellant claims that the revocation of his license, pursuant to **§ 337.035.3**, was unconstitutional because it was "disproportionate to the alleged offense and violated [his] due process and equal protection rights, in that no other psychologist has ever had a license revoked for a first offense-dual relationship violation and no justification for the excessive punishment of this appellant has been presented." We disagree.

The appellant's Point Relied On speaks in terms of due process and equal protection violations. However, in his argument, it is apparent that all he is really claiming is that because, to

his knowledge, no other psychologist had ever had his license revoked for one instance of sexual misconduct, the Committee's order, revoking his license, was arbitrary, capricious and unreasonable. Hence, his purported constitutional claims are deemed abandoned. ***Mortgage Elec. Registration Sys. Inc. v. Williams-Pelton*, 196 S.W.3d 50, 52 (Mo. App. 2005).**

As to his claim that the Committee's discipline of revocation was arbitrary, capricious and unreasonable, we find it is without merit. License revocation is expressly authorized in **§ 337.035.3** for the violations found by the AHC. In that regard, **§ 337.035.3** reads:

> Upon a finding by the administrative hearing commission that the grounds, provided in subsection 2, for disciplinary action are met, the committee may, singly or in combination, censure or place the person named in the complaint on probation on such terms and conditions as the department deems appropriate for a period not to exceed five years, or may suspend, for a period not to exceed three years, or revoke the license, certificate, or permit.

Because we recognize that the Committee is in a far better position to determine the appropriate discipline for a violation or violations, we will not substitute our judgment for its simply because a lesser punishment may have been justified in our eyes. ***Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 643 (Mo. App. 2004); *M.M. v. Mo. State Bd. of Accountancy*, 728 S.W.2d 726, 727 (Mo. App. 1987).** And, the mere fact the harshest discipline was imposed against the appellant and not in another case involving generally the same violations, does not, in and of itself, establish a basis for us to overturn the Committee's decision as to the appropriate discipline to be meted out on the basis that it is arbitrary, capricious or unreasonable. ***M.M.*, 728 S.W.2d at 727.** As such, having presented no other argument, other than the fact that other license holders have received lesser discipline for the same general violations, we find no merit to the appellant's claim.

Point denied.

IV.

In Point IV, the appellant claims that the AHC erred in deciding that he was subject to discipline by the Committee, pursuant to **§ 337.035.3** for violating **subsections (5), (6), (13)**, and **(15)** of **§ 337.035.2** because the AHC's required findings of fact, in support of its decision, were "plainly incorrect on matters critical to the disciplinary decision of revocation." Specifically, he claims that the AHC's findings were "plainly incorrect" in that they were riddled with inaccuracies, *i.e.*, "Footnote 1 refers to the '200' Revised Statute of Missouri." Despite limiting his claim to "inaccuracies" of the AHC's findings of fact in his Point Relied On, in his argument of the point, he argues, in addition, that the findings are "not supported by competent evidence." These, of course, are two separate and distinct issues. Accordingly, we are not required to address the appellant's argument, which is not set forth in his Point Relied On. **Rule 84.04(e); *Eltiste v. Ford Motor Co.*, 167 S.W.3d 742, 750 (Mo. App. 2005).** It matters not, however, inasmuch as the record clearly supports the AHC's decision, in any event.

Section 337.035.2 mandates that the hearing on the Committee's complaint be conducted in accordance with **chapter 621**. And, pursuant to **§ 621.135**, the provisions of **chapter 536** apply to hearings before the AHC. Hence, pursuant to **§ 536.090**, every decision of the AHC is required to be in writing, accompanied by written findings of fact and conclusions of law.

> The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order. Immediately upon deciding any contested case the agency shall give written notice of its decision by delivering or mailing such notice to each party, or his attorney of record, and shall upon request furnish him with a copy of the decision, order, and findings of fact and conclusions of law.

In order to comply with the requirements of **§ 536.090**, the AHC's findings of fact need only be specific enough to enable this court to review the decision intelligently and ascertain whether there is a reasonable basis for the AHC's decision. ***State ex. rel. Dotson v. County Comm'n of Clay County*, 941 S.W.2d 589, 593 (Mo. App. 1997).** In fact, in order to comply with the mandate of **§ 536.090**, the decision does not have to include a detailed summary of the evidence. ***Id.*** Rather, a list of the basic facts upon which the decision rests is sufficient. ***Id.*** "The law does not require that there be any explanation of why one set of facts was chosen over another. One may discern from the findings and conclusions the evidence which was accepted and the evidence which was rejected by the [agency]." ***Id.*** As long as we are not left to speculate on the facts underlying the decision, the agency's findings of facts will be deemed sufficient. ***Sturdevant v. Fisher*, 940 S.W.2d 21, 25 (Mo. App. 1997).** Only when we are left to speculate to the factual basis underlying the agency's decision are we required to remand the case to the agency so it can comply with **§ 536.090**. ***State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 247 (Mo. App. 2000).**

In his argument, the only factual issue that the appellant attacks in the context of inaccurate and unsupported findings of fact is the issue of whether there existed a psychologist/client relationship between him and the complaining witness at the time in question. Hence, the issue for us in this point is whether the AHC's findings of facts were sufficient for it to find, as it did, that such a relationship did, in fact, exist. In that regard, the AHC found:

> 6. At some point before November 19, Tenebaum told C.J. that he was a therapist and treated people for anger. He also told her that he specialized in treating children with attention deficit hyperactivity disorder and that he conducted a support group for divorced women.
>
> 7. The week before November 19, Tenenbaum and C.J. talked about how she could manage her anger against her ex-husband. Tenenbaum told C.J. that he helps patients, including divorced women, learn how to deflect anger.

Tenenbaum showed C.J. something like a karate move to demonstrate that she must deflect anger as a karate fighter deflects the force of an opponent.

8. ... Tenenbaum tried to help C.J. feel better about herself by telling her to repeat to herself, "I am a goddess," insisting that she repeat it out loud. She did.
...

9. When Tenenbaum went to the gym on the morning of November 19, C.J. told Tenenbaum that she had not called him to tell him his trainer had called in sick, because she looked forward to talking to him. He made her feel good about herself. They discussed her personal problems concerning her relationships with men.

10. C.J. told Tenenbaum that she would go to a therapist, but that her insurance would not cover it. Tenenbaum suggested trading his services for training. C.J. said that this would not work.

....

12. When C.J. rejoined the conversation, she mentioned again that she did not have insurance to go to a therapist. Tenenbaum told C.J. and Swetnam that he had taken on patients sometimes without requiring them to pay. He said that his wife, who managed the business aspect of his practice, got upset at him for doing this. Tenenbaum said that he would see C.J. as his patient and that she would be "my special little project." C.J. said, "great."

As we discussed in Point I, *supra*, the record supported the AHC's determination that a psychologist/client relationship existed between the appellant and the complaining witness at the time in question. And, the findings of fact quoted are consistent with that discussion of the record. Additionally, we find no inaccuracies that would render the AHC's findings and conclusions inaccurate to the extent that the AHC could not rely on them in determining that the relationship in question existed. Necessarily, then, they are sufficient for this court to conduct a meaningful review of the issue of whether there existed a psychologist/client relationship between CJ and the appellant at the time in question. Hence, the findings of the AHC did not violate **§ 536.090** requiring us to reverse and remand for additional findings.

In claiming that the findings of the AHC were deficient, the appellant primarily points to numerous typographical errors in the findings. For example, he points out that: "Footnote 1 refers to the '200' Revised Statute of Missouri. (L.F. Vol. I, 8) This Finding of Fact is not supported by competent evidence." Obviously, in that instance, the AHC meant 2000 rather than "200." While we agree that there are many typographical errors in the AHC's findings of fact, this in no way prevented us from engaging in meaningful appellate review as to the relevant issue in question, and, as such, is not a reason to remand the case to the AHC for it to correct its typographical errors.

Point denied.

V.

In Point V, the appellant claims that the Committee's order of revocation, pursuant to **§ 337.035.3**, is void, *ab initio*, because, contrary to the authority granted the Committee in **§ 337.035.3** to revoke his license, the order of revocation was signed by the executive director of the Committee rather than the Committee. We disagree.

The record establishes that the order of revocation was signed by the Committee's executive director. However, the record also establishes that after a contested hearing, the Committee voted to revoke the appellant's license, as authorized by **§ 337.035.3**. Hence, the appellant cannot argue reasonably that the order of revocation was not the order of the Committee.

There is nothing in the statutes or the rules that requires the actual members of the Committee to sign the decision to revoke. **Section 337.035.3** simply authorizes the Committee to revoke. Thus, we find no merit to the appellant's argument, *sans* any authority on point, that there is, in effect, no revocation absent an order to that effect signed by the Committee itself.

The appellant contends that the signing of the actual order of revocation is not a ministerial act that can be delegated by the Committee to its executive director. However, he cites no authority for that proposition. Moreover, he ignores the well settled proposition in the law that the authority to delegate such acts need not be expressed in the statute, but may be implied if there is a reasonable basis for such implication. ***State ex rel. McGill v. St. Louis Bd. of Police Comm'rs*, 178 S.W.3d 719, 723 (Mo. App. 2005).** It seems reasonable to us that the Committee, rather than signing each order of record individually, would simply designate the executive director to do so. In any event, at best, for the appellant, even if we were to find some merit to his claim, given the record that the Committee itself ordered the revocation, we would simply remand the case to the Committee with directions that if, in fact, it was the will of the Committee to revoke the appellant's license, that it re-issue the order with the signatures of the Committee members.

Point denied.

Conclusion

The judgment of the Circuit Court of Cole County affirming the decision of the AHC, that the appellant, a professional psychologist, licensed, pursuant to **§ 337.020** by the Committee, was subject to disciplinary action by the Committee, as authorized by **§ 337.035.3**, is affirmed.

Mandate

Missouri Court of Appeals

Western District

STEVEN J. TENENBAUM, PH.D., APPELLANT,	)	
vs. (COLE)	)	WD 67237
	)	CIR. CT. 05AC-CC01005
MISSOURI STATE COMMITTEE OF PSYCHOLOGISTS, RESPONDENT.	)	

Now on this day the judgment is affirmed. The Respondent shall recover against the Appellant the costs and charges herein expended, and shall have execution therefor.

Order filed.

STATE OF MISSOURI – Set.

I, TERENCE G. LORD, Clerk of the Missouri Court of Appeals, Western District, certify that the foregoing is a full, true and complete transcript of the judgment of the Missouri Court of Appeals, Western District, entered of record on the 29th day of June, 2007, in the above entitled cause.

Given under my hand and the seal of the Court, at Kansas City, Missouri, this 24th day of July, 2007.

Terence G. Lord

TERENCE G. LORD, CLERK

cc: Circuit Court Clerk
James Bernard Deutsch
Earl D Kraus

FAXED

FAXED